No. 87-1279-AFX
Status: GRANTED

Title: Alexia Morrison, Independent Counsel, Appellant
v.
Theodore B. Olson, Edward C. Schmults and Carol E. Dinkins

Docketed:
February 1, 1988

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for appellant: Morrison,Alexia

Counsel for appellee: Solicitor General, Martin,Thomas S., Sullivan Jr.,Brendan V., Stein,Jacob A.

NOTE: Notice of Appeal filed 2/1/88 cited

Entry	Date	Note	Proceedings and Orders
61	Apr 20 1908		8etter from Solicitor received and distributed.
1	Feb 1 1988	G	Statement as to jurisdiction filed.
2	Feb 1 1988	N	Motion of appellant to expedite and to dispense temporarily with printing pleadings filed.
3	Feb 1 1988	N	Motion of Lawrence E. Walsh, Independent Counsel for leave to file a brief as amicus curiae filed.
4	Feb 8 1988		REDISTRIBUTED. February 19, 1988
10	Feb 8 1988		Application for full stay of mandate filed.
5	Feb 9 1988	X	Brief amicus curiae of United States filed.
11	Feb 9 1988		Response requested by Rehnquist, CJ., to application for full stay of mandate.
8	Feb 11 1988	X	Brief of appellee Theodore B. Olson in Response to Independent Counsel's Motion to Expedite filed.
9	Feb 11 1988		Motion of appellee Theodore B. Olson to affirm filed.
15	Feb 11 1988		Response of appellee Olson to application for full stay of mandate filed.
23	Feb 11 1988		Response of appellees Schmults and Dinkins to application for full stay of mandate filed.
6	Feb 12 1988	X	Brief of appellees Edward C. Schmults and Carol E. Dinkins in response to motion of appellant to establish expedited schedule for briefing and argument filed.
7	Feb 12 1988	X	Memorandum of appellees Edward C. Schmults and Carol E. Dinkins filed.
13	Feb 12 1988		Repl, of appellant to application for full stay of mandate filed.
14	Feb 16 1988		Memo in reply of appellee Olson to application for full stay of mandate filed.
24	Feb 17 1988		DISTRIBUTED. February 19, 1988. (Application for full stay of mandate).
18	Feb 18 1988	G	Motion of Whitney North Seymour, Jr., Independent Counsel for leave to file a brief as amicus curiae filed.
17	Feb 22 1988		PROBABLE JURISDICTION NOTED. The motion of Lawrence Walsh, Independent Counsel, for leave to file a brief as amicus curiae is granted. The motions to establish an expedited schedule for briefing and oral argument are granted. Appellant's brief shall be filed by 3 p.m. March 9, 1988. Appellees' briefs shall be filed by 3

No. 87-1279-AFX

Entry	Date	Note	Proceedings and Orders
			p.m. April 8, 1988. Reply briefs, if any, shall be filed by 3 p.m. April 18, 1988. Oral argument is set for April 26, 1988 at 10 a.m. The motion to dispense temporarily with printing briefs is denied. The motions for additional time for oral argument are denied without prejudice. The application for full stay of mandate of the United States Court of Appeals for the District of Columbia Circuit presented to the Chief Justice and by him referred to the Court is granted pending the sending down of the judgment of this Court. Justice Kennedy took no part in the consideration or decision of these motions and orders.
			**********
19	Feb 22 1988		Application of the SG for leave to file a brief as amicus curiae in excess of the page limitation granted by Rehnquist, C.J., on February 22, 1988. Brief not to exceed 50 pages.
20	Feb 22 1988		Application of United States Senate for leave to file a brief as amicus curiae in excess of the page limitation granted by Rehnquist, C.J., on February 24, 1988. Brief not to exceed 50 pages.
22	Feb 23 1988		Application for leave to file appellant's brief on the merits in excess of the page limitation, and order granting same by Rehnquist, C.J., on February 26, 1988. Brief not to exceed 60 pages.
21	Feb 29 1988		Motion of Whitney North Seymour, Jr., Independent Counsel for leave to file a brief as amicus curiae GRANTED. Justice Kennedy OUT.
25	Feb 29 1988		Application of Speaker and House Leadership Group for leave to file brief as amicus curiae in excess of the page limitation, and order granting same by Rehnquist, C.J., on March 3, 1988. Brief may not exceed 50 pages.
26	Mar 9 1988		Lodgings received. (Blue binders, 2 boxes).
27	Mar 9 1988		Brief amicus curiae of AFL-CIO filed.
28	Mar 9 1988		Brief amicus curiae of United States Senate filed.
29	Mar 9 1988	G	Motion of Burton D. Linne, et al. for leave to file a brief as amici curiae filed.
30	Mar 9 1988		Brief amicus curiae of American Bar Association filed.
31	Mar 9 1988		Brief amicus curiae of Common Cause filed.
32	Mar 9 1988		Brief amicus curiae of Speaker and Leadership Group of House of Representatives filed.
33	Mar 9 1988		Joint appendix filed.
34	Mar 9 1988		Brief of appellant Morrison, Independent Counsel filed.
35	Mar 9 1988		Brief amicus curiae of Whitney Seymour, JR. filed.
36	Mar 9 1988		Brief amicus curiae of Public Citizen filed.
37	Mar 9 1988	G	Motion of Lawrence E. Walsh, Independent Counsel for leave to file a brief as amicus curiae filed.
41	Mar 9 1988		Brief amicus curiae of Center for Constitutional Rights filed.
42	Mar 11 1988		SET FOR ARGUMENT, Tuesday, April 26, 1988. (1st case).
40	Mar 18 1988		Record filed.

No. 87-1279-AFX

Entry	Date	Note	Proceedings and Orders
		*	Certified original record (Box) received.
43	Mar 18 1988	D	Motion of Lawrence E. Walsh, Independent Counsel for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
38	Mar 21 1988		Motion of Burton D. Linne, et al. for leave to file a brief as amici curiae GRANTED. Justice Kennedy OUT.
39	Mar 21 1988		Motion of Lawrence E. Walsh, Independent Counsel for leave to file a brief as amicus curiae GRANTED. Justice Kennedy OUT.
46	Mar 22 1988		Application of appellee Schmults for leave to file brief on the merits in excess of the page limitation, and order granting same by Rehnquist, C.J., on March 24, 1988. Brief not to exceed 60 pages.
47	Mar 23 1988		Application of appellee Olson for leave to file brief on the merits in excess of page limitation, and order granting same by Rehnquist, C.J., on March 28, 1988. Brief not to exceed 60 pages.
44	Mar 24 1988	N	Motion of the parties for additional time for oral argument, for divided argument and for leave for amici curiae to participate in oral argument filed.
45	Mar 28 1988		Supplement to motion of Lawrence E. Walsh, Independent Counsel, to participate in oral argument as amici curiae filed.
48	Mar 30 1988	D	Motion of of Michael K. Deaver for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
49	Mar 31 1988		CIRCULATED.
50	Apr 4 1988		Motion of Lawrence E. Walsh, Independent Counsel for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED. Justice Kennedy OUT.
51	Apr 4 1988		Motion of of Michael K. Deaver for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED. The joint motion for additional time for oral argument, for divided argument and for amici curiae to participate in oral argument is granted in part and denied in part. An additional thirty minutes is allotted for oral argument to be divided as follows: appellant - 30 minutes; the United States Senate, as amicus curiae - 15 minutes; one counsel for appellees - 30 minutes; and the Solicitor General, as amicus curiae - 15 minutes. Justice Kennedy OUT.
58	Apr 7 1988		Second application of the SG for leave to file a brief as amicus curiae in excess of the page limitation, and order denying same by Rehnquist, C.J., on April 7, 1988.
52	Apr 8 1988	X	Brief amicus curiae of United States filed.
53	Apr 8 1988	X	Brief amici curiae of Edward H. Levi, et al. filed.
54	Apr 8 1988	X	Brief amicus curiae of Michael K. Deaver filed.
55	Apr 8 1988	X	Brief of appellee Theodore B. Olson filed.

No. 87-1279-AFX

Entry	Date	Note	Proceedings and Orders
56	Apr 8 1988	X	Brief of appellees Schmults and Dinkins filed.
57	Apr 8 1988		Lodging received. (10 copies).
63	Apr 13 1988		Application for leave to file reply brief in excess of page limitation (A-795), and order denying same by Rehnquist, C.J., on April 15, 1988.
59	Apr 18 1988	X	Reply brief of appellant Morrison, Independ. Counsel filed.
60	Apr 18 1988	D	Motion of Whitney North Seymour, Jr., Independent Counsel, for leave to file a reply brief as amicus curiae filed.
64	Apr 22 1988		Letter from U.S. House of Representatives Republican Leader received and distributed.
62	Apr 25 1988		Motion of Whitney North Seymour, Jr., Independent Counsel, for leave to file a reply brief as amicus curiae DENIED. Justice Kennedy OUT.
65	Apr 26 1988		ARGUED.

Supreme Court, U.S.
FILED
FEB 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON,
EDWARD C. SCHMULTS, and
CAROL E. DINKINS,
Appellees.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

---

JURISDICTIONAL STATEMENT

ALEXIA MORRISON,
Independent Counsel
(Counsel of Record)
EARL C. DUDLEY, JR.,
RICHARD C. OTTO,
Deputy Independent Counsel,
2600 Virginia Avenue, NW
Washington, DC 20037
Counsel for Appellant.

February 1, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Whether a federal court may, consistent with the limitations of Article III of the Constitution and the prudential considerations governing the exercise of judicial power, entertain a challenge by the recipient of a grand jury subpoena to the constitutionality of the statute empowering the prosecutor conducting the investigation to proceed.

2. Whether an independent counsel appointed pursuant to Title VI of the Ethics in Government Act, 28 U.S.C. §§ 49, 591 *et seq.*, to conduct a single criminal investigation with precisely defined prosecutorial jurisdiction is a "principal" officer of the United States whose appointment is required by the Appointments Clause, U.S. Const., art. II, § 2, cl. 2, to be made by the President with the advice and consent of the Senate.

3. Whether, assuming such an independent counsel is an "inferior" officer within the meaning of the Appointments Clause, her appointment by a court of law is so "incongruous" as to transgress either the intended boundaries of the Clause or the limitations on judicial activity imposed by Article III.

4. Whether the separation of powers principle is offended by a statute empowering a court of law to appoint such an independent counsel and define her prosecutorial jurisdiction and insulating the conduct of the office from Executive Branch control by limiting, *inter alia*, the Attorney General's power of removal, given Congress's purpose to provide for even-handed enforcement of the criminal law against high-ranking government officials, and given the exclusive and unreviewable power of the Attorney General to

decide whether to apply for appointment of an independent counsel and his exclusive, albeit limited, power to remove such an officer.

5. Whether the statutory role of the appointing court is entangled with the prosecutorial function in a manner offensive to Article III, where the court has no power to initiate the process of appointment or to supervise the independent counsel's investigative or prosecutorial activities.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1279

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON,
EDWARD C. SCHMULTS, and
CAROL E. DINKINS,
Appellees.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

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JURISDICTIONAL STATEMENT

Appellant Alexia Morrison, independent counsel, appeals from the final judgment of the United States Court of Appeals for the District of Columbia Circuit, dated January 22, 1988, holding that the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591 *et seq.*, contravene the Appointments Clause of the Constitution, art. II, § 2, cl. 2, the separation of powers principle and the limitations of Article III.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears in the appendix hereto at p. 1a. The dissenting opinion of Circuit Judge Ruth Bader Ginsburg appears at p. 89a. These opinions are not yet reported.

The opinion of Chief Judge Aubrey E. Robinson, Jr., of the United States District Court for the District of Columbia, sustaining the constitutionality of the statute, appears at p. 129a, and is reported at 665 F. Supp. 56 (D.D.C. 1987).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 22, 1988. See p. 1a.

A notice of appeal to this Court was timely filed in the United States Court of Appeals for the District of Columbia Circuit on February 1, 1988. See p. 151a.

This appeal is being docketed in this Court within 90 days from the entry of the judgment below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1252. The judgment below is one entered by a court of the United States holding an Act of Congress unconstitutional in a civil action[1] to which

[1] The enforcement proceedings out of which this appeal arises are clearly civil in nature. *Shillitani v. United States*, 384 U.S. 364, 368 (1966).

appellant, an officer of the United States, was a party in her official capacity.[2]

[2] Appellant has authority under the statute to prosecute this appeal. Section 594(a) enumerates the powers of an independent counsel. Among them are:

> (2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel deems necessary;
>
> (3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;
>
> • • • •
>
> (9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States . . . .

The independent counsel may exercise these powers without obtaining the approval of the Solicitor General or the Attorney General. This point is made explicit in the legislative history. The Senate Committee Report on the original legislation stated that

> the authority given in paragraph (3) to appeal any decision of a court includes taking an appeal to the Supreme Court without the permission of the Solicitor General . . . .

S. Rep. No. 170, 95th Cong., 1st Sess. 67 (1977).

This conclusion is confirmed by 28 U.S.C. § 597(b), which cite preserves the right of the Solicitor General or the Attorney General to appear *amicus curiae* in any case in which an independent counsel participates. Indeed, the Department of Justice has exercised that right here, appearing in the court of appeals to assert that the statute is unconstitutional. Nonetheless, the Solicitor General has, to the extent it may be deemed necessary, authorized appellant to proceed in this Court.

Arguably, § 594(a)(9) suggests that appellant should prosecute

Should the Court determine that the appeal herein is improvidently taken, in that the proper mode of review is by petition for a writ of *certiorari*, it is respectfully requested pursuant to 28 U.S.C. § 2103 that these papers be treated as a petition for a writ of *certiorari* under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional and statutory provisions are set forth in the appendix at p. 153a.

HOW THE FEDERAL QUESTIONS WERE RAISED

Appellees challenged the constitutionality of the independent counsel statute by moving in the district court to quash subpoenas issued to them by a federal grand jury in connection with the independent counsel's investigation. The district court rejected these challenges on July 20, 1987, and ordered appellees to comply with the subpoenas. Appellees refused to comply, and on August 19, 1987, the district court held them in civil contempt and ordered them incarcerated until they complied with the subpoenas, or for the life of the grand jury. On the same date, the district court stayed the effect of its order of incarceration, on condition that appellees immediately seek expedited appellate review of the contempt order. The next day appellees noted their appeals and moved for expedited consideration. Expedited briefing and argument were ordered by the court of appeals.

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this appeal in the name of the United States. However, since that paragraph may refer only to criminal prosecutions, and since we anticipate that the Solicitor General will appear *amicus* in this proceeding, the independent counsel appears here in her own name and her official capacity.

On January 22, 1988, the court of appeals reversed the contempt judgment of the district court, holding that the independent counsel statute violated the Appointments Clause, Article III and the separation of powers principle.

The ripeness of the constitutional challenges was not questioned in the district court. At the time of the proceedings in the district court, another panel of the court of appeals had ruled, in an opinion then still under seal, that a recipient of a grand jury subpoena issued at the behest of an independent counsel could challenge the constitutionality of the independent counsel statute on a motion to quash the subpoena. Most, though not all, of that opinion was made public just prior to the briefing of these appeals. *See In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). Upon review of that opinion, independent counsel argued in the court of appeals that the ruling therein contradicted the holding of this Court in *Blair v. United States*, 250 U.S. 273 (1919), and that the issue was properly raised for the first time in the court of appeals, since it related to the existence of a case or controversy ripe for adjudication, *e.g.*, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *In re President's Comm'n on Organized Crime*, 783 F.2d 370, 373 (3d Cir. 1986). The court of appeals held, in accord with the earlier panel opinion, that the constitutional issue was ripe for adjudication. Alternatively, it held that the independent counsel had waived the point by not raising it in the district court. The court stated, "We do not think this is a jurisdictional issue." App. 9a n.6.

STATEMENT OF THE CASE

On May 29, 1986, appellant Alexia Morrison was appointed by the Special Division of the United States

Court of Appeals for the District of Columbia Circuit for the Appointment of Independent Counsels to investigate certain allegations concerning the conduct of appellee Theodore B. Olson, a former Assistant Attorney General.

The allegations against Mr. Olson grew out of a confrontation in 1982 and 1983 between the Legislative and Executive Branches, in which executive privilege was invoked to withhold documents subpoenaed by two Congressional subcommittees from the Environmental Protection Agency. Acting on the advice of the Department of Justice, the President ordered the Administrator of EPA to refuse to produce the documents on the ground that they contained "enforcement sensitive" information which could imperil ongoing administrative and judicial proceedings.

The Administrator complied with the President's order, and the House of Representatives voted to hold her in contempt. The United States Attorney took no steps to prosecute the contempt, and the Department of Justice sued the House, seeking a declaration that the claim of executive privilege was valid.[3]

Later it emerged that some of the withheld documents contained evidence of political manipulation of the "Superfund" hazardous waste site cleanup program. The claim of executive privilege was thereupon abandoned, the Administrator resigned, and one high-level EPA official responsible for Superfund administration was convicted of making a false statement.

An investigation of the Department of Justice's role in the EPA documents controversy was undertaken

[3] *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983). The district court dismissed the action.

by the House Committee on the Judiciary. Mr. Olson, then Assistant Attorney General for the Office of Legal Counsel, testified during that investigation before the Judiciary Subcommittee on Monopolies and Commercial Law on March 10, 1983. Both before and after Mr.Olson's testimony, the Department produced documents responsive to requests from the Committee. For a substantial period of time, however, the Department withheld from production certain handwritten notes and chronologies dealing with the EPA controversy, without informing the Committee that it was doing so. The existence of these materials was discovered by the Committee in April 1984 and they were ultimately turned over several months later.

In an extensive report published on December 5, 1985, the Committee questioned, *inter alia*, whether Mr. Olson's testimony before the Subcommittee was untruthful in several respects. The Committee also concluded that appellees Edward C. Schmults and Carol E. Dinkins, former Deputy Attorney General and former Assistant Attorney General for the Lands and Natural Resources Division respectively, may have engaged in acts, including the withholding of the notes and chronologies, which obstructed the Committee's inquiry.[4] Committee Chairman Peter W. Rodino, Jr., forwarded the report on December 12, 1985, to Attorney General Edwin Meese III, with a formal request that the latter seek the appointment of an

[4] See Report of the Committee on the Judiciary of the House of Representatives on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83, H.R. Rep. No. 435, 99th Cong., 1st Sess. (1985).

independent counsel under Title VI of the Ethics in Government Act, 28 U.S.C. § 49, 591 *et seq.*

Following a preliminary investigation by the Public Integrity Section of the Criminal Division,[5] the Attorney General on April 10, 1986, applied to the Special Division pursuant to 28 U.S.C. § 592(c)(1)[6] for the appointment of an independent counsel to investigate the Committee's allegations concerning Mr. Olson's conduct alone.[7] The Attorney General requested

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[5] Section 592(a)(1) of the independent counsel statute requires the Attorney General to conduct a preliminary investigation "upon receiving information that [he] determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in [serious criminal conduct.]" Section 591(b) defines the persons covered by the Act to include the President, the Vice President and a limited number of officials at the highest levels of the Executive Branch.

[6] Section 592(c)(1) requires that the Attorney General apply to the Special Division for the appointment of an independent counsel if "upon completion of the preliminary investigation, [he] finds reasonable grounds to believe that further investigation or prosecution is warranted." If, on the other hand, the Attorney General determines at this stage that "there are no reasonable grounds to believe that further investigation or prosecution is warranted," § 592(b)(1) provides that he shall so notify the Special Division, which then "shall have no power to appoint an independent counsel." A determination by the Attorney General not to seek the appointment of an independent counsel has been held to be final and unreviewable. *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (*en banc*).

[7] See Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in the United States House Judiciary Committee Report, April 10, 1986, at 11.

The Public Integrity Section had concluded that further investigation was warranted with respect to the conduct of Mr.

that the independent counsel be given jurisdiction to investigate whether Mr. Olson gave false testimony to the Subcommittee "and any other matter related to that allegation."[8]

Schmults and Ms. Dinkins, as well as Mr. Olson, and hence recommended the appointment of an independent counsel with respect to all three. See Analysis & Recommendations Concerning the Report of the House Judiciary Committee, Public Integrity Section, April 4, 1986, at 151-52. Because many high-level Criminal Division officials recused themselves, the Public Integrity report was reviewed by Deputy Assistant Attorney General John C. Keeney and by then United States Attorney for the District of Massachusetts William F. Weld, serving as the Attorney General's Special Assistant for the matter. Mr. Weld recommended the appointment of an independent counsel to investigate the conduct of Messrs. Olson and Schmults, but not Ms. Dinkins. See Memorandum, William F. Weld to Attorney General, April 4, 1986, at 1, 4, 8. Mr. Keeney concluded that an independent counsel was warranted only with respect to Mr. Olson's conduct. See Memorandum, John C. Keeney to William F. Weld, April 4, 1986, at 8. The Attorney General adopted Mr. Keeney's recommendation.

[8] Specifically, the Attorney General requested that the independent counsel be empowered to investigate

> whether the conduct of former Assistant Attorney General Theodore Olson in giving testimony at a hearing of the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee on March 10, 1983, and later revising that testimony, regarding the completeness of the Office of Legal Counsel's response to the Judiciary Committee's request for OLC documents, and regarding his knowledge of EPA's willingness to turn over certain disputed documents to Congress, violated 18 U.S.C. § 1505, § 1001, or any other provision of federal criminal law.

Attorney General's Report at 2-3. He also proposed that the independent counsel have jurisdiction to investigate "any other matter related to that allegation." *Id.* at 11.

The Special Division on April 23, 1986, acting pursuant to 28 U.S.C. § 593(b), appointed James C. McKay as independent counsel to investigate

> whether testimony of Mr. Theodore Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law . . . [and] any other allegation or evidence of violation of any Federal criminal law by Theodore Olson developed during . . . and connected with or arising out of that investigation . . . .[9]

Mr. McKay later resigned, and the Division appointed appellant Morrison to replace him on May 29, 1986, with the same prosecutorial jurisdiction.[10]

After a period of initial investigation and a round of litigation concerning the scope of the independent counsel's prosecutorial jurisdiction,[11] federal grand

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[9] Order of April 23, 1986, No 86-1, D.C. Cir. Indep. Couns. Div., at 1-2.

[10] Order of May 29, 1986, No. 86-1, D.C. Cir. Indep. Couns. Div.

[11] Appellant concluded on the basis of her initial investigation that the conduct of Mr. Schmults and Ms. Dinkins required further scrutiny. Accordingly, on November 14, 1986, she applied by letter to the Attorney General pursuant to 28 U.S.C. § 594(e) for referral of the allegations regarding them. In the same letter she requested that Attorney General Meese recuse himself from deciding the matter in view of his relationship with the persons involved and his participation in meetings concerning the EPA documents controversy as Counselor to the President. On December 17, 1986, the Attorney General replied through Deputy Attorney General Arnold I. Burns, declining to recuse himself and refusing the requested referral. (The Attorney General has since recused himself from all independent counsel matters.) Appellant then applied to the Special Division under § 594(e) for referral of the Schmults and Dinkins allegations. On April 2, 1987, the Division ruled that the Attorney General's determination not to seek the appointment of an independent counsel to investigate the conduct of Mr. Schmults and Ms. Dinkins was final and unreviewable under 28 U.S.C. § 592(b)(1), and hence that it had no power to make the requested referral. *In re Olson*, 818 F.2d 34 (D.C. Cir. Indep. Couns. Div. 1987). The Division went on, however, to interpret the existing grant of prosecutorial jurisdiction to permit investigation of whether Mr. Olson had participated in a scheme with others, including Mr. Schmults and Ms. Dinkins, to obstruct the Committee's inquiry. *Id.* at 47-48.

jury subpoenas *duces tecum* and *ad testificandum* were issued to Mr. Schmults and Ms. Dinkins and a subpoena *duces tecum* for documents only to Mr. Olson. The subpoenas were issued May 19, May 22 and June 4, 1987.

All three appellees moved in the district court to quash the subpoenas, challenging the constitutional authority of the independent counsel to proceed. It was claimed that the independent counsel provisions of the Ethics in Government Act violated the separation of powers principle, the Appointments Clause of the Constitution, art. II, § 2, cl. 2, and the strictures of Article III.[12]

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[12] Appellee Olson also argued that the scope of the investigation exceeded the powers of the independent counsel under the Act and the appointing order. The district court rejected this contention, and Mr. Olson renewed it on appeal. The court of appeals did not reach it, apparently in light of its determination that the Act was unconstitutional and hence that the independent counsel was without any authority to proceed. Judge Ginsburg in dissent concluded that the issue was not ripe for judicial review. App. 127a-28a.

On July 20, 1987, Chief Judge Aubrey E. Robinson, Jr., of the district court rejected appellees' contentions and upheld the constitutionality of the statute. He stated first that "it is clear to the Court that independent counsels are inferior officers" as that term is used in the Appointments Clause, and thus they need not be nominated by the President and confirmed by the Senate.[13] App. 132a. Chief Judge Robinson went on to conclude, under the test articulated in *Ex parte Siebold*, 100 U.S. 371, 398 (1880), that there was no disabling "incongruity" in the appointment by a court of a prosecutor with temporary, limited powers, and thus that the Act did not exceed the powers of Congress under the Appointments Clause or impose upon the courts duties in conflict with the strictures of Article III. App. 133a. The district court reasoned that given Congress' intent in passing the statute to create a mechanism for the even-handed enforcement of the criminal law against high-level government officials,

> it was clearly not incongruous for it to utilize the authority expressly stated in the Appointments Clause to allow an impartial court of law to select, at the application of the

[13] The Appointments Clause provides:

> He [the President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

> Attorney General, an individual to investigate and potentially prosecute criminal activity within the Executive Branch. . . . Although the Special Division appoints independent counsels and defines their jurisdiction, it plays no role in their investigations and performs no acts with regard to any prosecutions that may result from these investigations. For this reason, the Act clearly does not "place incompatible duties upon (any) court.["]

App. 133a-134a.

Turning to appellees' separation of powers contentions, the district court dealt first with the argument that the Act's requirement that the Attorney General possess "good cause" for the removal of an independent counsel, 28 U.S.C. § 596(a)(1), impermissibly restricted the President's exercise of executive power. Chief Judge Robinson read this Court's decisions to hold that

> where an inferior officer requires a certain degree of independence from the President for the proper execution of his assigned functions, the Congress may insulate him or her from the threat of termination at will by the Executive. . . . The same analysis when applied here demands the conclusion that independent counsel must not be subject to removal at will by the President. . . . [I]t is beyond peradventure that "the very purpose of the office requires a degree of independence from Presidential control."

App. 136a-137a, *quoting North v. Walsh*, 656 F. Supp. 414, 421 n.9 (D.D.C. 1987). For essentially the same reasons, the district court concluded that the Act's insulation of independent counsels from day-to-day control by the Executive Branch did no violence to the separation of powers principle:

> Supreme Court precedent as well as "common sense and the inherent necessities of the government coordination" suggest strongly that the authority of independent counsels does not violate the separation of powers principle.

App. 138a.

Appellees declined to obey the district court's order to comply with the subpoenas. Accordingly, on August 19, 1987, Chief Judge Robinson held them in contempt pursuant to 28 U.S.C. § 1826(a) and ordered them confined for the life of the grand jury, or until they complied with the subpoenas. On the same date, with the consent of the independent counsel, the district court stayed the effect of the order of confinement pending appellate review, on condition that appellees request expedited consideration by the court of appeals.

On August 20, 1987, appellees noted their appeals and moved for expedited review. The court of appeals granted the motions and established a schedule under which the appeals were briefed and argued by September 16, 1987.[14]

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[14] Numerous *amici curiae* appeared on both sides of the cases. The Department of Justice filed a brief and was granted oral argument time to attack the constitutionality of the statute. The Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives appeared in support of the statute, with the latter granted time to argue orally.

On January 22, 1988, the court of appeals, by a two-to-one vote, reversed the decision of the district court and held the statute unconstitutional. The majority opinion, by Circuit Judge Laurence H. Silberman, held that the Act violated the Appointments Clause in two distinct ways; that it trenched upon the authority of the President to "take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3, in derogation of the separation of powers principle; and that it impermissibly involved the judiciary in the prosecutorial function in disregard of the limitations of Article III.

The majority first stated that "the independent counsel's authority is so broad as to compel the conclusion that she is a principal officer [requiring, on the majority's view, presidential nomination and Senate confirmation] and therefore her appointment by the Special Court is unconstitutional."[15] App. 21a.

Next, the majority held that

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[15] Judge Silberman recognized that this conclusion was "sufficient to render [the Act] unconstitutional." App. 24a. However, the majority went on to resolve appellees, other contentions

> so that if this decision is appealed, and the Supreme Court decides that these additional claims must be reached, it will not have to "either proceed without the usual benefit of a lower-court opinion or else delay final disposition by remanding for that purpose." *Synar v. United States*, 626 F. Supp. 1374, 1383 (D.D.C.), *aff'd*, 106 S. Ct. 3181 (1986).

Id.

> even if the independent counsel were an inferior officer, and so did not have to be appointed by the President with the advice and consent of the Senate, the Act would violate the Constitution because it impermissibly interferes with the President's constitutional duty to "take Care that the Laws be faithfully executed."

App. 24a. The majority reached this view on the basis of three subsidiary conclusions.

First, it determined that judicial appointment of a prosecutorial officer—even an "inferior" one—was inconsistent with the Appointments Clause, which it read "generally [to] preclude[] inter-branch appointments." App. 42a. The force of this general prohibition was enhanced in the context of the independent counsel statute, the majority concluded, for two reasons. First,

> A statute that vests the appointment of an officer who prosecutes the criminal law in some branch other than the executive obstructs the President's ability to execute the law—a duty the President can practically carry out only through appointed officials.

App. 29a. Second,

> court appointment of prosecutors presents a more fundamental incongruity with our constitutional scheme than virtually any other type of inter-branch appointment, because it blurs that cherished separation of prosecutor and judge which is a crucial aspect of the Constitution's protection of individual liberty.

App. 42a.

The majority's second subsidiary conclusion concerning this aspect of the separation of powers question was that the statute

> further trenches on the concept of a unitary executive and departs from the separation of powers doctrine by substantially limiting the President's ability to remove or supervise the independent counsel.

App. 42a-43a. On this point Judge Silberman concluded that the "good cause" requirement of 28 U.S.C. § 596(a)(1) necessarily invaded the President's power to carry out what he termed the "core" executive function of criminal prosecution. The problem was, in the majority's view, exacerbated by the power given to the Special Division by 28 U.S.C. § 596(a)(3) to entertain and decide a civil action for reinstatement by an independent counsel contesting the Attorney General's removal decision. App. 53a-56a.

The majority's final subsidiary point respecting the invasion of executive prerogative was that the statute's insulation of the independent counsel's decision-making from Executive Branch supervision detracted from the President's ability to perform his duty to execute the laws. App. 60a.

Next, the majority turned to the question whether the perceived intrusion on executive prerogative could be justified by concerns within the purview of Congress. Here Judge Silberman concluded that

> At bottom . . . the statute's necessity must be predicated on Congress' concern that a personally corrupt President would be reluc-

> tant to attack malfeasance within his own Administration.

App. 62a-63a. This concern was, in the majority's view, adequately addressed by the impeachment power. *See* U.S. Const., art. I, § 2, cl. 5; § 3, cl. 6, cl. 7. Judge Silberman questioned whether the effort to provide even-handed enforcement of the criminal law against highly placed members of the Executive Branch posed a true conflict of interest for the President or the Attorney General. The majority also concluded that, even though most of the newly created powers were, in its view, granted to the judiciary, the inevitable effect of the Act was to aggrandize the power of the Congress at the expense of the presidency, and that what it called the independent counsel's "unique incentives to seek an indictment," App. 70a, rendered the scheme unacceptably invasive of individual liberty. Thus, the majority concluded that the Act "so deeply invades the President's executive prerogatives and responsibilities and so jeopardizes individual liberty as to be unconstitutional." App. 74a.

Finally, the majority stated that the statute violated the strictures of Article III:

> the Act violates the separation of powers doctrine because it entrusts a court with an executive function, which a court may not constitutionally undertake.

App. 75a. The majority read the statute to give the Special Division virtually unfettered power to "remove" an independent counsel and to create between the Special Division and the independent counsel the relation of "a superior to an executive officer under his supervision." App. 81a. The majority found in the

Act's provisions "intimate involvement of an Article III court in the supervision and control of a prosecutorial office," App. 85a, and concluded:

> This Special Court then holds over the head of the independent counsel both the broadsword and the rapier to control the pace and depth of the independent counsel's activities.

App. 82a.

Circuit Judge Ruth Bader Ginsburg dissented. Judge Ginsburg began by agreeing that an independent counsel performs functions properly characterized as "executive" in nature, but concluded under this Court's decision in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), that the statute did not impermissibly transfer authority over executive functions to the judiciary or to Congress. Judge Ginsburg read the provisions of the Act establishing the powers of the Special Division more narrowly than the majority, noting "the cardinal principle that courts construe statutes, whenever fairly possibly, to avoid any constitutional conflict." App. 97a n.10. Noting that the Attorney General possesses unreviewable discretion to refuse to apply for the appointment of an independent counsel and very substantial power to define the independent counsel's jurisdiction, and that the Special Division cannot initiate an investigation, appoint an independent counsel without an application by the Attorney General, supervise an independent counsel's conduct of an investigation, or remove an independent counsel from office, Judge Ginsburg concluded:

> The Division holds no control rein over the exercise of the independent counsel's prosecutorial discretion. Thus, there is no *transfer*

> of the prosecutorial function to the judicial branch of government.

App. 100a.

Judge Ginsburg next disagreed with the majority's conclusion that the statute interferes with the President's duty to "take Care that the Laws be faithfully executed." Acknowledging that the Act removes certain matters from day-to-day Executive Branch control, she considered, in reliance on *CFTC v. Schor*, 106 S. Ct. 3245 (1986), "three factors: the extent of the removal, whether the limitation affects a core executive function, and the purposes of the legislation." App. 105a. On the first question, Judge Ginsburg agreed that within the narrow sphere of his or her prosecutorial jurisdiction, the powers of an independent counsel are necessarily broad, but observed:

> Balancing the two factors—a circumscribed mission, but a full arsenal to accomplish that mission—and taking into account the Attorney General's role in applying, or choosing not to apply, for appointment of independent counsel, I conclude that the Ethics Act effects no intolerably sweeping displacement of executive branch authority.

App. 107a.

Judge Ginsburg disputed the notion that criminal prosecution is a "core" executive function, "in the sense that the job must be kept, in any and all cases, under the President's wing and cover." App. 108a. She pointed out in this regard that

> Prosecution was decentralized during the federalist period, . . . and it was conducted by district attorneys who were private practitioners employed by the United States on a fee-for-services basis. . . . I cannot conclude that the framers, or the Congress that enacted the Judiciary Act of 1789, would have considered prosecution a function that must remain, *sans* exception, with the President and his men.

App. 108a-09a (citations and footnote omitted).

Turning to an analysis of the statute's purpose, Judge Ginsburg observed:

> The Ethics Act is designed to function as a control against abuse of executive branch power. It implements the checking aspect of the separation of powers. . . . The Act is rooted in the principle that "no man can be a prosecutor or judge in his own case." . . . The Act thus operates as a means of maintaining the executive's proper—and properly circumscribed—constitutional role. The Act's purpose must be given the maximum possible weight.

App. 110a.

Judge Ginsburg next addressed the limitations on the power of the Executive Branch to remove an independent counsel and concluded that these limitations did no violence to the separation of powers principle. Reading *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958), to permit legislative restrictions on the removal of officers performing ex-

ecutive functions where the nature of the office requires freedom from Executive Branch control, she reasoned:

> The "freedom from interference" test must be understood to mean that when Congress has created an office otherwise consistent with separation of powers principles, and which requires independence from "Executive establishment" control—both judicially reviewable matters—Congress may implement the latter purpose by imposing restrictions on the executive's power to remove an individual occupying that office.
>
> There can be no doubt that limiting the President's power to remove independent counsel is essential to the instant legislative scheme. An unrestricted removal power would create a "here and now subservience" that would thwart the goal of independence.

App. 115a-16a. Judge Ginsburg thus concluded that the statute did not violate the separation of powers principle.

Judge Ginsburg likewise rejected the attack upon the statute predicated on the Appointments Clause. She first observed that an independent counsel did not fit neatly into either the category of plainly "superior" or plainly "inferior" officers, and concluded that "because the founding fathers did not settle the question, I regard the matter as one on which Congress' judgment [that the office is an "inferior" one] is owed a large measure of respect." App. 120a. Judge Ginsburg was similarly unpersuaded, in light of *Ex parte Siebold*, 100 U.S. 371 (1880), that the Constitution generally prohibits inter-branch appointments. Applying the "incongruity" test of *Siebold*, she stated:

> Vesting the appointment of independent counsel in the Special Division is not incongruous because . . . the Ethics Act neither unduly displaces executive branch prerogatives, nor transfers supervision of the prosecutorial function to the judiciary.
>
> Appointment of independent counsel by a court meets the test of statutory congruity as well. It would be incongruous in the extreme, given the purposes of the Act, to vest appointment of independent counsel in the President . . . .

App. 122a-23a.

Finally, Judge Ginsburg rejected the argument that the statute impermissibly assigns to a court functions outside the ambit of Article III's case or controversy limitation.

> Article III cannot be read to exclude the possibility of lodging in a court any appointment responsibility outside the third branch, for that would render the Appointments Clause prescription superfluous.

App. 125a. And she further refused to accept the proposition that the statute trenched upon Article III limitations by empowering the Special Division to define an independent counsel's jurisdiction.

> In fact, the Special Division merely assigns independent counsel an area of responsibility, closely tailored . . . to the Attorney General's

> application. It would be impossible for the Division to appoint independent counsel without in some manner defining—and restricting—the scope of her authority. When an appointment is made to a preexisting office, the title of the office may be all that is needed to define the duties of the new appointee. But where a statute provides for ad hoc appointments, such that the office itself must be defined at the time of appointment, the power to define is a necessary incident of the power to appoint.

App. 125a.

Judge Ginsburg thus concluded that the Act is constitutional.

THE QUESTIONS ARE SUBSTANTIAL

1. Ripeness

This Court held nearly seventy years ago in *Blair v. United States*, 250 U.S. 273, 283 (1919), that a recipient of a grand jury subpoena is

> not entitled to raise any question about the constitutionality of the statutes under which the grand jury's investigation was conducted.

Blair recognized that questions of testimonial privilege, which are forever lost if no means of raising them is made available, may be surfaced in response to a subpoena. *Id.* at 281. But it held that other challenges are not ripe for resolution at that stage.

Admittedly, *Blair* involved an effort to challenge the constitutionality of the substantive statute whose possible violation was the subject of the grand jury

investigation, while the present case involves a challenge to the procedural statute under which the prosecutor conducting the grand jury inquiry was appointed. We submit that this is a distinction without a difference and that the considerations underlying *Blair* are fully applicable here. The proffered distinction, however, was not the ground upon which the court of appeals rejected appellant's ripeness contention.

The court of appeals relied upon its earlier decision in *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987), where it concluded that the authority of *Blair* had been undermined by *United States v. Ryan*, 402 U.S. 530 (1971), and that a challenge to the constitutionality of the independent counsel statute by a subpoenaed witness was authorized by *Ryan*.

There is, however, no suggestion in *Ryan* that the Court intended any inroad on the *Blair* principle. Indeed, the two cases speak to analytically distinct problems. Whereas *Blair* involved a question of ripeness (or, alternatively, of standing), *Ryan* involved a question of finality for purposes of appeal. In the latter case a recipient of a subpoena *duces tecum* argued that compliance with the subpoena would be difficult and unduly burdensome. Though this Court did not discuss the issue, that challenge was "ripe" for adjudication in the *Blair* sense because compliance with the subpoena would, as in the case of a testimonial privilege, be irreversible, and the objection would hence be lost if not immediately entertained. The district court denied the motion to quash, and the subpoena recipient appealed without taking the step of refusing compliance and being held in contempt. The court of appeals, reaching the merits, reversed. This

Court held that the order denying the motion to quash was not appealable, reaffirming the holding of *Cobbledick v. United States*, 309 U.S. 323 (1940), that

> one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey.

402 U.S. at 532.

Here, of course, appellees chose to stand in contempt, but that does not render their challenge ripe for adjudication. *Ryan* did not purport to enlarge the class of challenges which may be entertained on a motion to quash. The constitutionality of the independent counsel statute is not a question like testimonial privilege or burdensomeness which is inherently mooted if not entertained prior to compliance with the subpoena. The constitutional issue may be raised and decided *if* and *when* Mr. Olson (or any other subpoena recipient) is indicted and convicted. *See Blair*, 250 U.S. at 282. The only thing at stake presently is the witness's obligation to attend the grand jury and give his evidence, an obligation which falls upon any citizen. *Id.* at 281.

Despite the court of appeals' perception of "tension" between *Ryan* and *Blair*, 827 F.2d at 779, the continued vitality of the latter is not subject to question. *See United States v. Nixon*, 418 U.S. 683, 687 n.2 (1974). Indeed, this Court has repeatedly held, citing *Blair*, that, in light of the imperatives of the grand jury process, not all constitutional claims may

be adjudicated at the grand jury stage. *See United States v. Calandra*, 414 U.S. 338, 345-46 (1974); *United States v. Dionisio*, 410 U.S. 1, 10 (1973); *cf. Costello v. United States*, 350 U.S. 359, 362-63 & n.6 (1956).

This case, we submit, is governed by *Blair*, and the court of appeals should have refused to reach appellees' constitutional challenge to the statute.[16]

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[16] The court of appeals' alternative holding that appellant had waived the ripeness issue by not raising it in the district court, App. 9a n.6, is likewise erroneous. Appellant did not raise the issue in the district court on the heels of the court of appeal's ruling in *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987), which had only days before reversed by Chief Judge Robinson on the identical question. Raising the issue in the district court would thus have been an act of futility, and the court of appeal's opinion (though not its order of reversal) was still under seal. Upon the unsealing of that opinion, appellant concluded that its reading of the *Ryan* case raised serious questions, and thus surfaced the issue in the court of appeals. Questions of ripeness and standing go to the existence of a "case or controversy" coming within the Article III power of a federal court. *E.g., Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *United Public Workers v. Mitchell*, 330 U.S. 75, 89-91 (1947). In some forms they implicate prudential concerns for the avoidance of unnecessary constitutional determinations. *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 138 (1974). In either case, because these questions go to the propriety of the exercise of judicial power at all, this Court and the court of appeals have uniformly held that they may not be waived by the parties and may be considered at any stage of the litigation. *E.g., Blanchette*, 419 U.S. at 138; *American Federation of Gov't Employees v. O'Connor*, 747 F.2d 748, 752 (D.C. Cir. 1984); *Duke City Lumber Co. v. Butz*, 539 F.2d 220, 221 n.2 (D.C. Cir. 1976). The court of appeal's reliance on *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984), is misplaced. That case involved no question of ripeness, standing or any other aspect of justiciability, but instead an effort to raise a new theory of recovery for the first time on appeal.

2. The Merits

The constitutional issues implicated by the decision below are plainly substantial.

Congress enacted the independent counsel provisions of the Ethics in Government Act in the aftermath of the Watergate experience, in an effort to create a mechanism to achieve the appearance and the reality of even-handed enforcement of the criminal law against officials at the highest levels of the federal government. See S. Rep. No. 496, 97th Cong., 2d Sess. 4-5 (1982). The constitutional questions were elevated and given careful consideration in the course of the legislative debate. *E.g.*, *id.* at 17. Though its compass is quite narrow, Congress has evidently deemed the statute an important component of the federal law enforcement scheme, having now enacted it in substantially the same form three times. *See* Pub. L. No. 95-521, 92 Stat. 1867 (1978); Pub. L. No. 97-409, 96 Stat. 2039 (1983); Pub. L. No. 100-191 (1987).

Presidents Carter and Reagan have both signed the legislation into law, the latter twice. And while his recent signing message expressed strong doubts about its constitutionality, President Reagan acknowledged the Act's importance to public confidence in the integrity of law enforcement by signing it, rather than vetoing it. Statement of Ronald Reagan on Signing H.R. 2939 Into Law, 23 Weekly Comp. Pres. Doc. 1526 (December 15, 1987).

Nine federal judges have by now opined on the constitutionality of the Act. All but two—the majority of the panel in the court below—have concluded that the Act does no violence, either to the separation of

powers principle or to any specific constitutional provision on which a challenge has been predicated.[17]

As the majority in the court below acknowledged, the field of separation of powers is an "area of the law . . . not marked by distinct guideposts." App. 58a. Precedent in this Court—or in any court, for that matter—interpreting the Appointments Clause and the principle of separation of powers is scarce, and the application in the present context of the decisions which do exist is not free from difficulty.

The decision below thus constitutes a sweeping rejection of a narrowly limited but highly important Act of Congress, whose significance to public confidence in the political and law enforcement process has been acknowledged by two Presidents. The decision conflicts with the weight of judicial authority on the subject of the Act's constitutionality, and it arises in a field where the decisions of this Court provide less than clear guidance.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction of this appeal.

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[17] *See* App. 89a (R. Ginsburg, J.); *In re Olson*, 818 F.2d 34, 43-46 (D.C. Cir. Indep. Couns. Div. 1987) (MacKinnon, Morgan & Pell, JJ.); *United States v. Nofziger*, Crim. No. 87-0309, D.D.C., December 18, 1987 (Flannery, J.); *In re Sealed Case*, 665 F. Supp. 56 (D.D.C. 1987); (Robinson, C.J.); *United States v. Deaver*, Civ. No. 87-0477, D.D.C., May 4, 1987, *app. dism.*, No. 87-3028, D.C. Cir., June 15, 1987 (Jackson, J.). *See also North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987) (Parker, J.) (denying preliminary injunction in part because Act will probably be upheld). The majority below also noted "the distinguished array of legal talent and institutional authority asserting the constitutionality of the . . . Act." App. 88a.

Respectfully submitted,

/s/ALEXIA MORRISON
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Dated: February 1, 1988 *Counsel for Appellant*

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5261

IN RE: SEALED CASE

No. 87-5264

IN RE: SEALED CASE

No. 87-5265

IN RE: SEALED CASE

Appeals from the United States District Court
for the District of Columbia

(Misc. Nos. 87-00197, 87-00205 and 87-00215)

Argued September 16, 1987

Decided January 22, 1988

Barry S. Simon with whom *Brendan V. Sullivan, Jr.*, *Nicole K. Seligman*, *Jacob A. Stein* and *Robert F. Muse*, were on the joint brief for appellants in 87-5261 and 87-5265.

Thomas S. Martin with whom *Anthony C. Epstein*, *David E. Zerhusen*, *David W. DeBruin* and *Carl S. Nadler*, were on the brief for appellant in 87-5264.

Earl C. Dudley, Jr., Deputy Independent Counsel, with whom *Alexia Morrison*, Independent Counsel and *Richard C. Otto*, Deputy Independent Counsel, were on the brief for appellee in 87-5261, 87-5264 and 87-5265.

Douglas N. Letter, Attorney, Department of Justice, with whom *James M. Spears*, Acting Assistant Attorney General, *Robert J. Cynkar*, Deputy Assistant Attorney General, *Robert E. Kopp*, *William Kanter*, *Neil Koslowe*, *Jay S. Bybee*, Attorneys, Department of Justice, were on the brief for amicus curiae, United States, urging reversal.

Steven R. Ross, General Counsel to the Clerk, U.S. House of Representatives, with whom *Charles Tiefer*, Deputy General Counsel, *Michael L. Murray* and *Janina Jaruzelski*, Assistant Counsel to the Clerk, U.S. House of Representatives, were on the brief for amicus curiae, Speaker and Bipartisan Leadership Group of the U.S. House of Representatives, urging affirmance.

Herbert J. Miller, Jr., *Randall J. Turk* and *Stephen L. Braga* were on the brief for amicus curiae, Michael K. Deaver, urging reversal.

Eric R. Glitzenstein and *Alan B. Morrison* were on the brief for amicus curiae, Public Citizen, urging affirmance.

Donald J. Simon, *Cass Sunstein*, *Laurence H. Tribe*, *Archibald Cox* and *Philip B. Heymann* were on the brief for amicus curiae, Common Cause, urging affirmance.

Rex E. Lee, *Irvin B. Nathan* and *Robert MacCrate* were on the brief for amicus curiae, American Bar Association, urging affirmance.

Lawrence E. Walsh, Independent Counsel, *Paul L. Friedman*, *Guy Miller Struve* and *James E. McCollum, Jr.*, Associate Counsel, were on the brief for amicus curiae, Independent Counsel Lawrence E. Walsh, urging affirmance.

Michael Davidson, Senate Legal Counsel, *Ken U. Benjamin, Jr.*, Deputy Senate Legal Counsel, *Morgan J. Frankel* and *Susan B. Fine*, Assistant Senate Legal Counsel, U.S. Senate, were on the brief for amicus curiae, U.S. Senate, urging affirmance.

Before: RUTH B. GINSBURG, SILBERMAN, and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Dissenting Opinion filed by *Circuit Judge* RUTH B. GINSBURG.

SILBERMAN, *Circuit Judge*: Three former government officials, Theodore B. Olson, previously Assistant Attorney General, Office of Legal Counsel, Carol E. Dinkins, previously Assistant Attorney General, Lands Division,[1] and Edward C. Schmults, previously Deputy Attorney General of the United States, appeal from a district court judgment rejecting their challenge to the authority of a federal prosecutor, the independent counsel, appointed under the provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-598 (1982 & Supp. III) (the "Act"), to issue subpoenas compelling the testimony of these appellants before a grand jury concerning actions

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[1] Carol Dinkins subsequently held the post of Deputy Attorney General of the United States.

taken while they served in their governmental positions.[2] Appellants contend that the Act on which the independent counsel's authority is based is unconstitutional. We agree with appellants, and so we reverse the district court order holding appellants in contempt for failing to answer the subpoenas.

I.

The criminal investigation involved in this case arose out of a heated dispute over document production between the Executive and Legislative Branches. In September 1982, two subcommittees of the House of Representatives requested the Environmental Protection Agency ("EPA") to provide them with internal EPA documents pertaining to the clean-up of hazardous waste sites. The House was concerned that the Reagan administration was expending funds so as to aid Republican candidates in the 1982 Senate elections. At the direction of the Department of Justice, the EPA made some documents available but refused to grant access to enforcement-sensitive documents on the grounds that their release would interfere with law enforcement efforts. After negotiations between the two branches failed, the two subcommittees issued subpoenas to the Administrator of the EPA. The Administrator, invoking executive privilege by order of the President, refused to comply with the subpoenas. The House of Representatives responded by citing the Administrator for contempt, at which point the Administrator and the United States together filed a lawsuit against the House. Eventually, by March of 1983, the Administrator and the two subcommittees reached agreement on document production.

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[2] The names of appellants were previously under seal. Their names, already well publicized, and certain facts regarding the background of the investigation are revealed because we think those facts relevant to our opinion. The case's significance, in any event, makes it impossible to maintain secrecy. *See* FED. R. CRIM. P. 6(e) (3) (C) (i).

Ancillary to this running battle between Congress and the Executive, a subcommittee of the House Judiciary Committee began an investigation into the Justice Department's role in the EPA document controversy. On March 10, 1983, as part of that investigation, the subcommittee heard testimony from Assistant Attorney General Olson. At the completion of the investigation, the Judiciary Committee issued a lengthy report, over the vigorous dissent of the Republican members of the Committee, containing charges of serious wrongdoing by senior Department of Justice officials. REPORT ON INVESTIGATION OF THE ROLE OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY DOCUMENTS FROM CONGRESS IN 1982-83, H.R. REP. No. 435, 99th Cong., 1st Sess. (1985).

Based on this report, in December 1985 the Judiciary Committee requested the Attorney General to conduct a preliminary investigation, as required by the independent counsel provisions of the Ethics in Government Act, into possible violations of federal law on the part of several administration officials who appeared before the Judiciary Committee, including former Assistant Attorney General Olson. The Act applies to the President and Vice President, the Director and Deputy Director of the Central Intelligence Agency, cabinet-level officials, various other officials in the Department of Justice and in the Executive Office of the President, and high level officials on the President's campaign committee. 28 U.S.C. § 591.

Under the Act, the Attorney General must begin an investigation, to be completed within ninety days, if he finds the information of wrongdoing given him "sufficient to constitute grounds to investigate." 28 U.S.C. § 592. During this preliminary investigation, the Attorney General's investigative resources are severely limited; he has "no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas." *Id.* If the Attorney General "finds reasonable grounds to believe that

further investigation is warranted," then he must refer the matter to the Independent Counsel Division of the United States Court of Appeals for the District of Columbia Circuit (the "Special Court").[3] Thus, at this initial investigatory stage, the Attorney General's role is quite restricted—he is directed to decide not if prosecution is probably warranted but merely whether more investigation is needed, and in making this limited determination he is denied the usual truth-finding tools of a prosecutor.

On April 10, 1986 the Attorney General asked the Special Court to appoint an independent counsel to investigate

> [w]hether the conduct of former Assistant Attorney General Theodore Olson in giving testimony at a hearing of the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee on March 10, 1983, and later revising that testimony, regarding the completeness of the Office of Legal Counsel's response to the Judiciary Committee's request for OLC documents, and regarding his knowledge of EPA's willingness to turn over certain disputed documents to Congress, violated 18 U.S.C. § 1505, § 1001, or any other provision of federal criminal law.

Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in United States House Judiciary Committee Report ("Report of Attorney General") at 2-3 (footnote omitted). The Attorney General also requested that the independent counsel have authority to investigate "any other matter related to that allegation." *Id.* at 11.

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[3] The Special Court is composed of three judges designated by the Chief Justice of the United States. One member of the Special Court must be a judge of the United States Court of Appeals for the District of Columbia Circuit. 28 U.S.C. § 49.

The Judiciary Committee's request for an investigation also pointed to possible wrongdoing by Edward Schmults and Carol Dinkins. The Attorney General concluded, however, that there were no reasonable grounds to believe that further investigation of these allegations was warranted and so did not refer these matters to the independent counsel. *Id.* at 22, 47-48. In deciding whether to refer a matter to the independent counsel, the Attorney General is required by § 592(c)(1) of the Act to "comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws." The decision concerning Schmults and Dinkins was made in accordance with a Department of Justice policy that criminal prosecutions not be commenced "if there is no reasonable prospect that an unbiased jury would return a criminal conviction." Report of the Attorney General at 26.

In April of 1986 the Special Court appointed James McKay as independent counsel. Shortly thereafter, upon McKay's resignation, the Special Court appointed Alexia Morrison to replace him. In November 1986 Morrison applied to the Attorney General, pursuant to 28 U.S.C. § 594(e),[4] for expanded jurisdiction to probe charges against Edward Schmults and Carol Dinkins. In particular, the independent counsel wished to investigate "whether Mr. Olson's testimony was part of a larger, concerted plan, including Mr. Schmults, Ms. Dinkins, or others, to obstruct or impede the Committee's investigation . . . possibly in violation of federal criminal law." Letter from Alexia Morrison to Edwin Meese III at 3 (Nov. 14, 1986). The Attorney General refused this request because his initial investigation of the Judiciary Committee's allegations had "found no reasonable grounds

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[4] 28 U.S.C. § 594(e) provides that an "independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction."

to believe that further investigation or prosecution of these allegations is warranted." Letter from Arnold I. Burns, Deputy Attorney General, to Alexia Morrison at 2 (Dec. 17, 1986). The letter of refusal specifically mentioned that the allegations of a criminal conspiracy among Schmults, Dinkins, and Olson had been investigated and that no reasonable grounds for continuing that investigation had been found. *Id.*

Faced with the Attorney General's refusal to broaden her authority, the independent counsel applied to the Special Court, pursuant to 28 U.S.C. § 594(e), for added jurisdiction to investigate Schmults and Dinkins. The Special Court denied this request, on grounds that it lacked the authority "to refer allegations to the Independent Counsel when the Attorney General has specifically determined, under § 592(b)(1) that those allegations should not be pursued." *In re Olson*, 818 F.2d 34, 47 (D.C. Cir. Indep. Couns. Div. 1987). However, the Special Court found that "authority to investigate allegations and evidence that Theodore Olson was engaged in an unlawful conspiracy with others" was "implicit" in the Special Court's initial grant of jurisdiction to the independent counsel. *Id.* Therefore, the Special Court held that the independent counsel had the power to investigate " 'whether Mr. Olson's testimony was part of a larger, concerted plan, including Mr. Schmults, Ms. Dinkins, *or others*, to obstruct or impede the Committee's investigation.' " *Id.* at 48 (quoting letter from Alexia Morrison to Edwin Meese III at 3 (Nov. 14, 1986)).[5]

[5] The Special Court indicated that "[i]f further investigation by the Independent Counsel turns up credible evidence of federal criminal violations by others," the independent counsel could renew her request to the Attorney General for authority to prosecute Schmults and Dinkins. *In re Olson*, 818 F.2d at 48. Thus the Special Court, by authorizing additional investigation of Schmults and Dinkins, kept alive the possibility of their prosecution.

Soon after the release of the Special Court's opinion, the independent counsel subpoenaed Edward Schmults, Theodore Olson, and Carol Dinkins to appear before a grand jury. The three appellants moved to quash the subpoenas on grounds that the independent counsel provisions of the Act were unconstitutional. On July 20, the district court upheld the constitutionality of the independent counsel provisions. *In re Sealed Case*, No. 87-0197 (D.D.C. 1987) (mem). In order to pursue their challenge to the Act on appeal, the appellants refused to appear before the grand jury and were held in contempt pursuant to 28 U.S.C. § 1826(a). Appellants renew their challenge to the constitutionality of the Act on appeal of the order holding them in contempt.[6]

The appellants contend that the Act's appointment provision, its restriction on removal, and its vesting of supervisory powers in an Article III court are unconstitutional. They argue that placing the appointment of the independent counsel in the Special Court violates the appointments clause, the doctrine of separation of powers, and Article III of the Constitution. And they claim that restrictions on the President's power to supervise and remove the independent counsel interfere with the President's ability to execute the law. More broadly, appellants assert that the Act as a whole jettisons traditional adherence to constitutional doctrines of separation of

[6] The independent counsel expresses doubt in this court as to the appropriateness of review of appellants' constitutional claims prior to conviction. We have previously decided in an unrelated case that a witness who has been subpoenaed by an independent counsel may obtain judicial review of the constitutionality of the Act if held in contempt. *See In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). In any event, as the independent counsel did not question the propriety of the district court's consideration of the constitutional claim, she has lost the opportunity to do so on appeal. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984). We do not think this is a jurisdictional issue.

powers and a unitary executive, and in so doing, seriously weakens constitutional structures that serve to protect individual liberty. For the reasons set forth below, we agree with appellants that the Act is unconstitutional.

II.

Two hundred years after the adoption of the United States Constitution the federal courts are, essentially for the first time, required to construe closely the appointments clause of Article II. Appellants claim that the independent counsel is not an "inferior" officer as that term is used in the clause and therefore she may be appointed only through nomination by the President and confirmation by the Senate. Since all parties agree that the independent counsel is an officer of the United States and not an employee, her appointment by the Special Division of this court would, if appellants are correct in their interpretation of the clause, be unconstitutional.

The appointments clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

Two classes of officers of the United States are contemplated by the clause, those who *must* be appointed by the President with the advice and consent of the Senate, whom we shall refer to as principal officers, and inferior officers, who, if authorized by legislation, can be appointed by heads of departments, courts of law, or the President

alone. The independent counsel, supported by various amici, contends that the only officers who must be appointed with the advice and consent of the Senate and not otherwise are Supreme Court Judges, ambassadors, other public ministers, and consuls. All other officers of the United States, they argue, including department heads and federal judges, are inferior officers who could, if legislation authorized it, be appointed in accordance with the second part of the clause.

We think that this is an unnatural reading of the clause, for the first part of the clause insists that not only Judges and Ambassadors must be appointed with the advice and consent of the Senate, but also all other officers of the United States "*whose Appointments are not herein otherwise provided for.*" "Herein" must refer to at least the clause itself and thus perforce includes inferior officers who may be appointed in accordance with the second portion of the clause.[7] It follows that the term "all other Officers of the United States" encompasses more than the inferior officers described in the second part of the clause because that part is phrased as an exception to the "all other Officers" language. Otherwise—under the independent counsel's interpretation—"all other Officers" are, each and every one, inferior officers and thus the phrase requiring presidential appointment with the advice and consent of the Senate for "all other Officers" not "otherwise provided for" is utterly without meaning. Among the officers who must be appointed by the President with the advice and consent of the Senate it seems most obvious to include the heads of departments and federal judges since they are specifically empowered (along with the President to whom they are linked in

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[7] The only other places in the Constitution where appointment is provided for are Art. I, § 3, cl. 2 (appointment of Senators by state executives to fill vacancies); Art. I, § 8, cl. 16 (reserving the appointment of officers of the militia to the states).

the clause) to appoint inferior officers. In fact, as we discuss further in Part III, the purpose of the excepting clause was to ensure that courts of law and heads of departments could appoint officers inferior to them; it was certainly not meant to allow the appointment of department heads without the advice and consent of the Senate.[8]

A single clause of the Constitution should not be interpreted inconsistently with the remainder of the Constitution. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Central to the government instituted by the Constitution are the doctrines of separation of powers and a unitary executive, which we discuss at length in Part III, and yet the independent counsel interprets the appointments clause as if those doctrines were nonexistent. Understanding that the President could not fulfill his constitutional role by himself, the Framers envisioned that the Executive Branch would be divided into departments whose officers would be appointed by the President and who could be removed by Congress only through the impeachment process. *See Myers v. United States*, 272 U.S. 52 (1926). It strains belief that in the face of this scheme the Framers would insert a clause into the Constitution that would allow Congress, the branch most feared by the Framers, *see* THE FEDERALIST No. 48 (J. Madison); *see also Bowsher v. Synar*, 106 S. Ct. 3181, 3189 (1986), to abrogate the President's power to appoint Executive Branch officers.

[8] The First Congress concluded that the heads of departments were principal officers. *See* 1 ANNALS OF CONG., 455-56 (J. Gales ed. 1789) (Rep. White); *id.* at 509 (Rep. Smith); *id.* at 518 (Rep. White); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 362 n.1 (5th ed. 1891) ("[w]hether the heads of departments are inferior officers, in the sense of the Constitution, was much discussed . . . . The result of the debate seems to have been that they were not."). Substantial weight should be given to constitutional interpretations by the First Congress. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Not only does the independent counsel's interpretation seem inconsistent with the language of the clause and the remainder of the Constitution, it makes, to our view, no functional sense. "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976), and therefore would not have drafted an appointments clause that had a capricious meaning. Yet appellee's suggested interpretation has, we are forced to conclude, just that capricious character. If department heads and federal judges (other than Supreme Court Justices) are inferior officers, then it presumably follows that any one department head could be authorized, consistent with the Constitution, to appoint all of the rest and all the federal judges to boot.[9] And of course, a federal court could instead be given the reciprocal power to appoint all department heads and all the rest of the federal judges. To be sure, it would not have been illogical for the Framers to leave to subsequent legislation *all* procedures for appointment of officers or to limit those appointments only by the second portion of the appointments clause (requiring appointment by the President, courts of law, or department heads). But having specially provided that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for," it is implausible to suggest that the Framers intended that no officers, even heads of departments, had to be appointed in this fashion. In fact, the statutes enacted by the First Congress creating the various executive departments are

[9] As we show in Part III, the excepting clause cannot, consistent with the rest of the Constitution and the intent of the Framers, be read to allow officers in one branch to appoint officers of another branch. However, the independent counsel and various amici argue that there are no limits on "interbranch" appointments, and thus their theory of the clause would allow such strange results.

silent regarding the mode of appointment of the principal officers of those departments, thereby suggesting that the legislators believed that they had no choice in the matter because they understood the Constitution to require that principal officers be appointed by the President with the advice and consent of the Senate and therefore it was not necessary to provide for appointment in the statute itself.[10]

The independent counsel's reading is particularly incongruous because the first part of the clause requires that senior diplomats be appointed by and with the consent of the Senate. The Framers certainly expected that the new government would be organized into departments, and the most obvious prospective department in their minds (in fact the first one created), must have been the Department of Foreign Affairs.[11] The Framers could not have been more concerned that the Senate be a check on a presidential appointment of an ambassador, or a consul, than that it be a check on the appointment of the Secretary of the Department of Foreign Affairs, to whom, in all likelihood, the ambassadors or consuls would report.[12] Through a procedure requiring the participation of the President and the Senate, the Framers had as their object

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[10] 1 Stat. 28-29 (1789) (Department of Foreign Affairs); *id.* at 49-50 (Department of War); *id.* at 65-67 (Treasury Department).

[11] Earlier drafts of the Constitution actually listed the prospective departments by name. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (M. Farrand ed. 1911) ("M. Farrand"). The Constitution itself refers to departments in Art. I, § 8., cl. 18 and Art. II, § 2, cls. 1 and 2. The Department of Foreign Affairs was created on July 27, 1789. 1 Stat. 29.

[12] The Act creating the Department of Foreign Affairs (subsequently the State Department) provides that the Secretary of the Department "shall perform and execute such duties . . . relative to correspondences, commissions or *instructions* to or with public ministers or consuls." 1 Stat. 29 (1789) (emphasis added).

the creation of a role for both branches in choosing officers who were to be entrusted with discretion in carrying out the execution of the laws. Appellee's suggestion that this object extended only to ambassadors, public ministers, consuls, and Judges of the Supreme Court is quite unpersuasive.

Even though the Framers surely contemplated that ambassadors and consuls would be subordinate to the head of the Department of Foreign Affairs, we can readily understand why these officers nevertheless were thought of as principal rather than inferior. In the eighteenth century, a minister posted abroad had to exercise a good deal of independent judgment—certainly more than is the case today—simply because communications were so much slower than now.[13] Similarly, lower federal judges who, according to our reading of the clause, are principal officers, although of course subordinate in a sense to the Supreme Court, are not subject to personal supervision. The Supreme Court, in the exercise of its power to affirm, reverse, or modify, supervises cases—not judges who, appointed for life, are in a supervisory sense not inferior to anyone.[14]

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[13] In addition, at that time the President was thought to have the power, derived from the law of nations, to appoint ambassadors and consuls without these offices' being created by Congress. It was not until 1855 that Congress provided by statute for specific grades and salaries for diplomatic officers. THE CONSTITUTION OF THE UNITED STATES OF AMERICA 445-46 (E. Corwin ed. 1953). Certainly an ambassador must be appointed by the President and confirmed by the Senate, but this leaves open the question of what defines an ambassadorial position, and whether, for example, Congress could require that any assistant to the President who negotiates a treaty must be confirmed by the Senate. *See id.* at 447-48. Such questions are not presented by this case, however.

[14] Although both the Supreme Court and the circuit courts promulgate rules of evidence and procedure, particularly for

The only judicial support the independent counsel musters for her construction of the appointments clause is *United States v. Germaine*, 99 U.S. 508 (1878). In that case, the Supreme Court held that a part-time surgeon appointed by the Commissioner of Pensions was not an officer of the United States because, *inter alia*, the Commissioner of Pensions was not a department head. In preliminary discussion, the Court described inferior officers as inferior to those "specially mentioned" in the appointments clause, *id.* at 510, and the independent counsel asserts that the only officers "specially mentioned" are Judges of the Supreme Court, ambassadors, etc. We disagree. There is no reason to infer that by "specially mentioned," the Court meant to exclude the officers "specially mentioned" in the second part of the clause, *i.e.*, the President, federal judges, and department heads. *See* E. CORWIN, THE PRESIDENT, 411-12 n.28 (5th rev. ed. 1984) ("'[T]he President alone,' 'the courts of law,' and 'the heads of departments' are also 'specially mentioned.'"). Indeed, in concluding that "inferior" commissioners and bureau chiefs were not department heads authorized by the Constitution to appoint inferior officers, the Court described them as "mere aids and subordinates of the heads of the departments," *Germaine*, 99 U.S. at 511, thus recognizing that the word "inferior" in the appointments clause has a functional rather than a merely ceremonial meaning. See also *Collins v. United States*, 14 Ct. Cl. 568, 574 (1879):

> The word inferior is not here used in that vague, indefinite, and quite inaccurate sense which has been suggested—the sense of petty or unimportant; but it means subordinate or inferior to those officers in whom respectively the power of appointment may be

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criminal cases, on the authority of a general supervisory power, *see McNabb v. United States*, 318 U.S. 332, 340-41 (1943), this power does not involve the supervision of judges. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting).

> vested—the President, the courts of law, and the heads of departments.

Moreover, the Court in *Germaine* included department heads among the principal officers of whom the President, in the same section of the Constitution, is authorized to require an opinion in writing. Since the Court regarded the department heads as principal officers, it could not have meant department heads to be regarded at the same time as inferior officers within the meaning of the appointments clause.

We therefore reject the independent counsel's construction of the appointments clause, but we are still confronted with the question whether the independent counsel is an inferior officer—for under the clause, only if she is an inferior officer can she be appointed without action by the President and without the advice and consent of the Senate. The answer to that question depends, it seems to us, given the functional interpretation of the clause suggested by the Supreme Court in *Germaine*, on whether the independent counsel properly can be thought subordinate to a principal officer. Is she in the exercise of her duties, in other words, a "mere aid[] and subordinate of the head of [a] department[]" or does she instead employ such independence of authority as to place her on the principal officer side of the appointments clause dichotomy?

The independent counsel relies almost entirely on her basic construction of the clause and only briefly makes what could be construed as the alternative argument that even under our reading of the clause she is nonetheless an inferior officer. She contends that since the Attorney General can appoint, and has appointed, independent counsel with precisely the authority and duties that she enjoys by virtue of her court appointment and because such authority has been sustained by this court, *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*,

No. 87-869 (Jan. 19, 1988), she must be an inferior officer.[15] This is so because the Attorney General may constitutionally appoint only inferior officers, and, according to the independent counsel, the constitutional status of an officer cannot change merely because she is appointed by a special division of a court rather than the Attorney General. The independent counsel, however, ignores the factor in our prior opinion that was decisive to our determination that the independent counsel was "inferior." His powers were conferred by regulation promulgated by the Attorney General and could be terminated by repeal of that regulation. Not only had the Attorney General appointed the independent counsel, he could, by revoking or modifying the regulation "at any time," *id.* at 56, have modified the independent counsel's duties or terminated the office.[16] Under such circumstances the independent counsel was, as were prior "independent" special prosecutors appointed by the Attorney General, clearly an inferior officer.[17]

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[15] After litigation commenced in another case challenging the constitutionality of the Ethics in Government Act, the Attorney General offered all existing independent counsel, including Morrison, a parallel Justice Department appointment. *See* 52 Fed. Reg. 7270 (1987); *In re Sealed Case*, 829 F.2d at 52-53. This independent counsel declined the parallel appointment.

[16] The dissent suggests that such a revocation would be "practically remote," Dissent at 32 n.38, but that was not the tenor of our prior opinion. *Cf. Bowsher v. Synar*, 106 S. Ct. 3181, 3189 n.5. Nor did we there determine that the independent counsel was inferior because of the nature of his duties—it was the power of the Attorney General to rescind the regulation and thereby presumably control or abolish his duties that was decisive.

[17] The Office of the Special Prosecutor during the Watergate era is not analogous to the independent counsel post. As the Supreme Court stated in *United States v. Nixon*, 418 U.S. 683 (1974), President Nixon, through the Attorney General, could have removed the Special Prosecutor at any time. *Id.* at 696.

But that is not this case—this independent counsel has refused to accept the Attorney General's appointment. She cannot now base an argument for constitutional inferiority on the Attorney General's appointment power that she has explicitly rejected. Nor, in our view, can she predicate the Attorney General's superior status, as she suggests, on the Attorney General's statutory removal power which she describes as "exclusive." As we discuss later in our opinion, the Attorney General has essentially only the authority to petition the Special Court to authorize the removal of an independent counsel. The Attorney General therefore cannot be thought of as the independent counsel's constitutional superior. Under the statute, the Attorney General has the effective power neither to appoint her, to define, circumscribe, or supervise her duties, nor to remove her or terminate her office. We need not consider whether the Special Court, which has a good deal more authority under the statute vis-a-vis the independent counsel, is her constitutional superior since neither the independent counsel nor for that matter any amicus contends that the court fulfills that role.[18]

Similarly, the statute under which courts may make temporary appointments of United States Attorneys, which was upheld against a constitutional challenge in *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963), did not create an office insulated from the normal supervisory and removal powers of the Executive Branch. The court in *Solomon* said that "the exercise of the appointive power by the judiciary in no wise binds the executive. The statute clearly contemplates that the executive branch is free to choose another United States Attorney at any time, the judicial appointment notwithstanding." *Id.* at 842-43.

[18] Any claim that the Special Court is the constitutional superior of the independent counsel would undermine much of the independent counsel's defense of the statute and would

The independent counsel does, however, at least suggest that one can be an inferior officer within the meaning of the appointments clause without having *any* hierarchical superior. In *Ex parte Siebold*, 100 U.S. 371 (1880), upon which the independent counsel relies for this proposition, the Supreme Court upheld the constitutionality of a statute giving the courts of law the responsibility for appointing election commissioners. *Id.* at 379-82. The statute itself did not specify, as the independent counsel correctly maintains, who, if anyone, was the constitutional superior of the commissioners. That issue, however, was not discussed in the Court's opinion because it was not contended that the commissioners were principal officers. In truth, the duties of those election commissioners were relatively modest; they were charged with the observation of federal congressional elections and the reporting of improprieties to Congress—which, of course, has the constitutional responsibility to "[j]udge . . . the Elections, Returns and Qualifications of its own Members." U. S. CONST. art. I, § 5, cl. 1.

As the Court observed, the commissioners were not clearly within any of the three branches (which is in large part why the Court held their appointment by a court constitutional, *see* discussion *infra* pp. 36-37). They were certainly not, as is the independent counsel, an indisputable part of the Executive Branch. The commissioners seem to us actually to have been subordinates of Congress, but, in any event, since the issue was not even presented, the Court's opinion is hardly authority for the independent counsel's proposition. The Supreme Court has not, moreover, had any occasion to decide whether members of independent regulatory agencies or commissions who are also not clearly within any of the

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place into even starker relief the constitutional anomaly of a court of law appointing and supervising an executive officer. *But see* Dissent at 38 n.47.

three branches, are principal or inferior officers. In *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), the Court described the election commissioners involved in that case, who exercised a good deal more authority than the commissioners in *Siebold*, as "*at the very least* . . . inferior officers" (emphasis added), thus suggesting that they might be principal officers. It is unnecessary, however, for us to decide this more difficult question the Supreme Court reserved in *Buckley v. Valeo*. Whatever the status of commissioners or members of independent agencies, we think the independent counsel's authority is so broad as to compel the conclusion that she is a principal officer and therefore her appointment by the Special Court is unconstitutional. After all, the independent counsel's authority is—at least with respect to any matter within her jurisdiction—broader even than the Attorney General's. As has been argued in this case and previous ones before our court challenging the constitutionality of the statute, *see In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, No. 87-869 (Jan. 19, 1988), the independent counsel has authority unchecked by the President himself to decide that an investigation shall continue and that a prosecution shall be initiated. She must give only that consideration that she deems appropriate to all those factors relevant to prosecution—including the foreign relations of the United States—that we discuss in Part IV.

In its opinion upholding the constitutionality of the independent counsel statute, the district court determined that the independent counsel was an inferior officer because " 'he is apopinted for a single task to serve for a temporary limited period.' " *In re Sealed* Case, No. 87-0197, mem. op. at 3 (D.D.C. July 20, 1987) (quoting *In re Olson*, 818 F.2d 34, 44 (D.C. Cir. Indep. Couns. Div. 1987)). The district court relied upon *United States v. Eaton*, 169 U.S. 331, 343 (1898), in which the Supreme Court stated that "[b]ecause the subordinate officer is charged with the performance of the duty of the

superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official." In *Eaton*, the Supreme Court considered whether Congress had the "power to vest in the President [alone] the appointment of a subordinate officer called a vice-consul" who would temporarily carry out the duties of a consul. *Id.* The Court upheld this mode of appointment, because a contrary ruling would have voided any delegation of the duties of a superior officer to an inferior, no matter how minor or temporary the delegation might be. *Id.* Unlike the statute considered in *Eaton*, the Ethics in Government Act does not temporarily delegate the Attorney General's authority to investigate and prosecute criminal wrongdoing by high government officials to an inferior official. Instead, the Act removes that authority from the Attorney General altogether and places it entirely in the independent counsel. *See* 28 U.S.C. § 597. The independent counsel's authority over the investigation is not temporary; it is coterminous with the investigation itself. Hence, the independent counsel is not analogous to an inferior officer who temporarily carries out the tasks of a superior while the superior is absent or disabled.

That the independent counsel's appointment expires when her task is completed seems to us irrelevant. Ambassadors are often appointed in accordance with the appointments clause for discrete negotiations and the Framers, experienced as they were with foreign affairs, contemplated just that eventuality.[19] This independent counsel, moreover, not unlike others, has served for almost two years, which is as long as many cabinet officers.

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[19] The Framers distinguished between diplomatic agents who would carry out continuing assignments at diplomatic posts and ambassadors who would be commissioned to negotiate particular treaties. *See, e.g.*, THE FEDERALIST No. 42, at 279-80 (J. Madison) (J. Cooke ed. 1961); 2 J. STORY, *supra* note 8, at 351.

Of course a given department remains in existence after the cabinet officer resigns, but in the same sense the independent counsel role seems constitutionally more substantial than any one incumbent; a number have been appointed under the statute and there are several in operation at the present. We think that the appointments clause necessarily comprehends, in distinguishing principal from inferior officers, the depth and breadth of the authority exercised, not merely the contemplated tenure of the job. The magnitude of the task, not its expected period of performance, is constitutionally determinative.

Although it could well be argued that independent counsel, who often supervise more employees than cabinet departments once employed, are themselves "heads of departments," it is also unnecessary for us to determine the reach of that phrase. Suffice it for the case for us to hold as we do that the independent counsel is not an inferior officer and thus falls at minimum within that category of the appointments clause of "all other Officers of the United States, whose Appointments are not herein otherwise provided for." As such, her appointment is constitutionally invalid.[20]

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[20] The dissent maintains that we should defer to Congress' interpretation of the Constitution, as to whether an officer is inferior or principal (as well as to, among other matters, how independent the independent counsel should be). *See* Dissent at 32-33. But no authority is cited for this proposition and we do not believe we can treat Congress' constitutional interpretation as we would an agency's construction of its governing legislation—that is not our role. "To allow a simple majority of Congress to have final say on matters of constitutional interpretation is . . . fundamentally out of keeping with the constitutional structure." *Oregon v. Mitchell*, 400 U.S. 112, 205 (1970) (Harlan, J., concurring and dissenting). "It is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). "The Court and the profession have treated the judicial duty as requiring independent judgment, not deference, when the decisive issue turns on the

III.

The Act's failure to comply with the appointments clause is sufficient to render it unconstitutional. We decide appellants' other constitutional claims, however, so that if this decision is appealed, and the Supreme Court decides that these additional claims must be reached, it will not have to "either proceed without the usual benefit of a lower-court opinion or else delay final disposition by remanding for that purpose." *Synar v. United States*, 626 F. Supp. 1374, 1383 (D.D.C.), *aff'd*, 106 S. Ct. 3181 (1986). The appellants claim, and we agree, that even if the independent counsel were an inferior officer, and so did not have to be appointed by the President with the advice and consent of the Senate, the Act would violate the Constitution because it impermissibly interferes with the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

Authority to prosecute an individual is that government power which most threatens personal liberty, for a prosecutor "has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2141 (1987). The Framers of the Constitution were justly fearful of this power. They had recently witnessed the crime of sedition used as a tool of an oppressive government to retain power unjustly and to persecute its enemies, and English experience with the Star Chamber further shaped

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meaning of the constitutional text, and that specific conception of the judicial duty is now deeply engrained in our constitutional order." Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 9 (1983) (footnotes omitted); *see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61-62 (1982).

their views on criminal law and criminal process. *See Ullmann v. United States*, 350 U.S. 422, 427-28 (1956). Counsel for one appellant captured this point pungently at oral argument when he said that our forefathers "understood prison very well and they understood the monarch and the power of an unaccountable monarch to put people in prison."

The Constitution therefore carefully distributes the various responsibilities for criminal prosecution among each of the three branches, so that citizens may not be endangered by one branch acting alone. Madison referred to the doctrine of separation of powers as an "essential precaution in favor of liberty," THE FEDERALIST No. 47, at 323 (J. Cooke ed. 1961), and it is part of "our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *United States v. United States District Court*, 407 U.S. 297, 317 (1972). Federal criminal law can be enacted only by Congress. This innovation marks a major shift from prior practice, which countenanced a common law of crime created by the same judges who tried the cases. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Congress' role in the criminal law was carefully confined to this initial stage of law creation. Congress is, accordingly, explicitly forbidden to pass bills of attainder, one of the few positive prohibitions on congressional power contained in Article I. *See United States v. Brown*, 381 U.S. 437, 442 (1965) ("the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature"). And the power of Congress to impeach officers of the United States is also limited—the penalty "shall not extend further than to removal from Office, and disqualification

to hold and enjoy any Office of honor, Trust or Profit under the United States." U.S. CONST. art. I, § 3, cl. 7. Even through impeachment then, Congress is powerless to deprive any individual of liberty.

Next the Constitution vests the power to initiate a criminal prosecution exclusively in the Executive Branch; this power is encompassed within the Executive's power to "take Care that the Laws be faithfully executed." The Executive has "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965). "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws[.]" *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986).[21]

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[21] The independent counsel cites *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), and *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), as authority for the proposition that the President may not refuse to execute a valid law, and thus, that law enforcement is not an exclusive Executive Branch prerogative. These two cases hold that a court may issue a writ of mandamus to an executive officer, including the President, to require that officer to perform a purely ministerial duty. A ministerial duty is defined as " 'one in respect to which nothing is left to discretion.' ". *National Treasury Employees Union*, 492 F.2d at 607-08 (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1867)). Such a duty is distinguished from discretionary or policymaking functions, which are subject to presidential guidance. "There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president." *Kendall*, 37 U.S. at 610. By "politics" we understand the Supreme Court to refer to what we now call policy, not partisan politics. *See* discussion *infra* pp. 44-45. The independent counsel surely does not mean to suggest that the process whereby a prosecutor determines whether or not to bring criminal charges against a defendant is a mere ministerial act not involving the weighing of policy questions.

The Framers provided for a unitary executive to ensure that the branch wielding the power to enforce the law would be accountable to the people. "The idea of a 'plural executive,' or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source." *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) (footnote omitted).[22] Under the Constitution, the President, as the head of the Executive Branch, is the person ultimately responsible for a decision to initiate a criminal prosecution. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *United States v. Cox*, 342 F.2d at 171. If that decision is contrary to the mores and customs of the community, the community has a visible target for its grievances. No anonymous directorates hold sway here, no impenetrable bureaucracies or commissions obscure the identity of the responsible official; the chain of command leads directly upward to the President. As Hamilton wrote, "it is far more safe there should be a single object for the jealousy and watchfulness of the people; and in a word that all multiplication of the executive is rather dangerous than friendly to liberty." THE FEDERALIST No. 70, at 479 (J. Cooke ed. 1961); *see also Myers v. United States*, 272 U.S. 52, 131-34 (1926). Not merely an abstract idea of political theory, the President's accountability is a hallmark of our democracy—perhaps best put in President Truman's gritty aphorism "The buck stops here." For no federal government function is it more vital to the protection of

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[22] "Of the decisions clearly taken [at the Constitutional Convention], perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President." Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599 (1984). *See generally* THE FEDERALIST No. 70 (A. Hamilton).

individual liberty that ultimately the buck stop with an accountable official—the President—than in the prosecution of criminal laws.

That the government prove its case in a jury trial before a neutral and disinterested court, insulated with extraordinary tenure protection from the other two branches of government and shielded from popular pressure, is the final safeguard contained in the original Constitution upon the federal government's power to prosecute the criminal laws. *See Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3256 (1986). The constitutional scheme is as simple as it is complete—Congress passes the criminal law in the first instance, the President enforces the law, and individual cases are tried before a neutral judiciary involved in neither the creation nor the execution of that law. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124, 2133-34 & n.10 (1987). The Ethics in Government Act, it seems to us, deliberately departs from this framework in both its particular provisions and in its general purpose, which is to authorize an officer not accountable to any elected official to prosecute crimes. It may well be that the constitutional framework is awkward or burdensome in particular cases, but, under this system, efficiency is knowingly sacrificed in various ways so that liberty may be protected. Therefore, a law whose purpose is to ensure a more efficient or more trustworthy means for the state to prosecute crime than that contemplated by the Constitution comes into this court with a heavy burden. *See Bowsher v. Synar*, 106 S. Ct. 3181, 3193-94 (1986). We begin by discussing the appointment, removal, and supervisory provisions of the Act separately. Each of these interferes with the President's performance of his duty to execute the laws. We then consider the combined impact of all of these sections of the statute on the President's constitutionally guaranteed executive powers.

A.

The Act directs that the independent counsel be appointed not by the President, nor by the Attorney General, but rather by a court of law. Even if we assume arguendo that the independent counsel is an inferior officer, her appointment appears quite inconsistent with the Constitution's placement of the executive power in the President. A statute that vests the appointment of an officer who prosecutes the criminal law in some branch other than the executive obstructs the President's ability to execute the law—a duty the President can practically carry out only through appointed officials. *See* THE FEDERALIST Nos. 70, 76, 77 (A. Hamilton). The concept of a responsible and accountable unitary executive would mean very little without the power to appoint, for the President's capacity to enforce the law is largely dependent upon the identity and caliber of the officers who compose the Executive Branch, and if the President is without the power to appoint, he cannot define the character of his administration. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court declared unconstitutional a statute that allowed Congress to appoint members of the Federal Election Commission on grounds that congressional appointment of executive officers violated the appointments clause. The Court determined that the Commissioners exercised executive power because they had, among other powers, the power to bring civil actions against violators of the election laws. *Id.* at 138-40.

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.
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> . . . .

> . . . Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . .

Id. at 135-36 (quoting *Myers v. United States*, 272 U.S. 52, 117, 163-64 (1926)). Indeed, even when the Supreme Court has upheld restrictions on the President's power to remove officers of the Executive Branch who performed "predominantly quasi-judicial and quasi-legislative" rather than executive duties, *see, e.g., Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), the Court "carefully emphasized that although the members of such agencies were to be independent of the Executive in their day-to-day operations, the Executive was not excluded from selecting them." *Buckley*, 424 U.S. at 133 (citation omitted).

The independent counsel nevertheless defends her appointment with the proposition that the "plain language" of the appointments clause allows Congress to vest the appointment of inferior officers, including the independent counsel, in a court of law, or in more general terms, that the appointments clause should be read to allow officers in one branch to appoint officers in another branch, *i.e.*, to make "inter-branch" appointments. The relevant section of that clause, as we have discussed, is "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2. Examining the words alone, we see two basic possible interpretations: The first, pressed upon us by the independent counsel, is that the Constitution delegates to Congress *without limitation* the power to authorize appointment of *any and all* inferior officers by the President, *any* court of law, or *any* head of department. The second, advanced by appellants, is that the courts of law (Judicial Branch) and heads of departments (Executive Branch) may not be authorized

to appoint officers belonging to the other branch. In the earliest case to raise the issue the Supreme Court thought the second interpretation rather than the first to be obviously the one intended by the Framers. "The appointing power here designated, in the latter part of the section, was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law . . . ." *In re Hennen*, 38 U.S. (13 Pet.) 230, 257-58 (1839).[23]

More recently, Judge Skelly Wright, dissenting in *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967), squarely rejected—in our view correctly—the independent counsel's plain meaning argument:

> [I]t is simply not true that Article II expresses any meaning quite so clear. Its language very naturally admits the common-sense reading that courts of law and the other listed offices were meant to appoint only those officers "inferior" *to them* . . . . And the narrower reading harmonizes with the most apparent purpose of Article II: to let Congress clothe Secretaries and courts with the necessary authority for filling vacancies in their own staffs.

Id. at 921 (Wright, J., dissenting) (emphasis added).[24]

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[23] We quote this language from *In re Hennen* to refute the independent counsel's claim that the clause has a single plain meaning. We recognize that the impact of this statement was somewhat narrowed by *Ex parte Siebold*, 100 U.S. 371, 398 (1880). *See infra* pp. 35-38.

[24] Judge Wright's dissent is similarly quoted merely to show that the clause can easily bear more than one meaning. *Hobson v. Hansen* upheld a statute vesting the appointment of members of the District of Columbia school board in the judges of the United States District Court for the District of Columbia. The federal court in the District of Columbia had, at that time, a dual character, deriving both from Article III and from "powers conferred upon it in the exercise by Congress of its plenary legislative power over the District of

Although we certainly sympathize with the notion of seeking the meaning of constitutional provisions first in textual language, we do not think this issue can possibly be resolved by invocation of the plain meaning rule. The clause, as we have observed, is certainly susceptible to at least two interpretations, and so we turn next to the available history of its adoption to gain insights into the Framers' purpose. *See Missouri Pac. Ry. v. Kansas*, 248 U.S. 276, 280 (1919). The appointment provision itself represents a major change from the Articles of Confederation, which vested the appointment of officers in the Congress. And the records of the debates of the Convention evince serious discussion of the clause. For example, John Dickenson moved to allow Congress to vest the appointment of some officers in the "Legislatures or Executives of the several states." 2 M. Farrand, *supra* note 11 at 406. This putative encroachment on the President's power was rejected. Subsequently, James Wilson had occasion to object to Senate participation in the appointment process, "as blending a branch of the Legislature with the Executive. Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute. Responsibility is in a manner destroyed by such an agency of the Senate." *Id.* at 538-39.

Columbia." *Hobson v. Hansen*, 265 F. Supp. at 907. The court discussed the appointments clause of Article II and interpreted it to allow inter-branch appointments, but the court did not rest its decision on that point, holding rather that even if the appointments clause were interpreted more narrowly, congressional power over the District of Columbia was sufficient to sustain the statute. *Id.* at 919 n.19. In any event, we are not bound by a decision of a three judge district court. *See San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1315 n.24 (9th Cir. 1981); 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.402[1] n.21 at 16 (2d ed. 1984). The opinion of the court in *Hobson v. Hansen* is discussed further in Part V.

Gouverneur Morris responded that "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." *Id.* at 539. The tenor of the debate reveals a jealous guarding of the President's appointment power, even against any participation by the Senate, to the end that one man would be solely responsible for choosing government officers. It is true that more time was spent discussing judicial appointments (although much of that discussion was relevant to appointment power in general), but we take that as indication that the Convention was less sure of where to place the appointment of judges than that of "all other Officers."

Debate in the Convention on an earlier version of the appointments clause, which contained no reference at all to inferior officers, suggested that the delegates were concerned as to the practical difficulties of staffing a government of a nation whose distances were vast at a time when travel and communications were slow and often difficult. George Mason accordingly proposed that officers be appointed by a council rather than by the President with the approval of the Senate. Otherwise he worried that the Senate would have to be in continuous session in order to approve appointments. Rufus King responded, however, that "[h]e did not suppose it was meant that all the minute officers were to be appointed by the Senate, or any other original source, *but by the higher officers of the departments to which they belong*." *Id.* at 539.

Later in the Convention, the inferior officer provision was added with little discussion and it appears therefore that the clause was designed to meet concerns expressed in the earlier dialogue between Mason and King. When the additional language was proposed, Madison observed that "[i]t does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices."

Id. at 627.[25] In other words, Madison, like King, thought the first part of the appointments clause, without the amendment, bestowed an implied power on principal officers to appoint officers *subordinate to themselves*—a power the amendment merely made explicit (but nonetheless in restricted form since it was given only to the President, courts of law, and department heads). The delegates to the Convention, we conclude, did not even contemplate that the appointments clause they fashioned permitted Congress to authorize superior officers like department heads to appoint inferior officers subordinate to *other* department heads; still less did they intend that the courts of law could be empowered to appoint officers in the Executive Branch who could not, consistent with the separation of powers, be constitutionally "inferior" to judges.

Turning from the debates of the Convention to the Federalist Papers (which are perhaps even more important as an interpretative aid because they, unlike the records of the Convention, were available to the state ratifying conventions), we note that Hamilton repeatedly and at some length discussed the immense importance of vesting the appointment power in the President. The purpose of these discussions is quite obscure if the only officers the President is constitutionally required to ap-

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[25] It is interesting to note that Madison thereby suggested that the appointments clause before amendment contemplated non-inferior (superior officers) *below* department heads. *See supra* Part II pp. 11-12. Madison did not explain what he meant by "some cases"; he may have been referring to situations where subordinates of Heads of Departments exercised great discretion and so could have been expected to appoint *their* own subordinates. In any event, the amendment Madison opposed was adopted, thus deciding the issue—other than the President, only heads of departments and courts of law may be authorized to appoint inferior officers. By implication, this decision rejected the notion that officers subordinate to heads of departments are "Superior Officers." *But cf.* Dissent at 30.

point are ambassadors, public ministers, and judges of the Supreme Court. *See* THE FEDERALIST Nos. 70, 76, 77 (A. Hamilton).

The dissent refers to an early version of the Judiciary Bill as an indication that *some* members of the First Congress thought judicial appointment of federal prosecutors constitutionally permissible. Dissent at 34-35 n.41. We do not believe that one line from a precursor of a lengthy bill, subsequently modified to provide for presidential appointment of federal prosecutors, *see* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 109 n.137 (1923), is persuasive. Indeed, the change would seem more significant than the original language, especially since it may have been motivated by constitutional concerns. For as amicus curiae from the House of Representatives brought to our attention, the appointment provision was revised in response to a recommendation by Chancellor Robert Livingston that it would be "better that the Attorney General be appointed by the executive to which department he *necessarily* belongs than to the judicial with which the executive sh[ould] in no sort be confounded?" Letter from Robert Livingston to Oliver Ellsworth (June 26, 1789) (on file at Huntington Library, San Marino, California) (emphasis added).

The delegates' discussion at the Convention, the Federalist Papers, and the action of the First Congress all then support an understanding of the appointments clause that would forbid judicial appointment of executive officers. The independent counsel argues that this common sense interpretation of the clause is foreclosed by *Ex parte Siebold*, 100 U.S. 371 (1880), in which the Supreme Court upheld a statute that vested in the courts the appointment of election commissioners, thereby, according to the independent counsel, holding that Congress may generally vest the appointment of executive officers in the courts of law, rather than in the President or the department heads. *See also Hobson v. Han-*

sen, 265 F. Supp. 902, 912-13 (D.D.C. 1967). In *Siebold*, however, the Court did not see the case before it as raising a question of congressional encroachment on the President's power to execute the laws. The statute involved in *Siebold*, unlike the independent counsel statute, did not prohibit the President from ordering his Attorney General to investigate election fraud.[36] The Court framed the question in *Siebold* as implicating only the proper role of the judiciary, not the powers of the President; according to the Court, the issue was whether "the act of Congress imposes upon the Circuit Court duties not judicial, in requiring them to appoint the supervisors of elections." 100 U.S. at 397.

It was not necessary, therefore, that the Court decide whether the appointment of election supervisors by a court deprived the *executive* of a power vested in it by the Constitution. Indeed, the law considered in *Siebold* was an exercise of congressional power under Article I, § 5, cl. 1 of the Constitution which provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members."[37] The election supervisors had no power to initiate prosecutions. Their function included attending the elections, challenging legally dubious votes, keeping watch over the ballot boxes and submitting reports to Congress. Congress presumably could have chosen any method of appointing such officials, including vesting the appointment power in itself. As the Supreme Court observed in *Buckley v. Valeo*, 424 U.S. 1, 137 (1976), in the context of a discussion of a Federal Election Commission which included members appointed by Congress, "[i]nsofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them." Thus Congress' decision before the Court in *Siebold* to authorize the circuit courts to appoint officials charged with tasks the Constitution assigns to Congress itself did not implicate the doctrine of separation of powers except to the extent that it raised the question whether such appointments could be made by a court without violating Article III's case or controversy requirement, and it is only to *that* question that the Court's discussion of the appointments clause is relevant.

[36] 28 U.S.C. § 597 requires the Attorney General to "suspend all investigations and proceedings" regarding matters within the jurisdiction of an independent counsel.

[37] The *Siebold* Court itself referred to Art. I, § 4, cl. 1, which provides that Congress may by law regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." However, the role of the election supervisors seems, especially in its information-gathering aspects, most closely related to the power of each House to be the "Judge of the Elections, Returns and Qualifications of its own Members." *See Siebold*, 100 U.S. at 389 (in cases of contested elections, the conduct of the election officers is examined by Congress).

Our reading of *Siebold* is buttressed by the Court's approving reference to *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), in which several Supreme Court Justices sitting on the circuit courts suggested that a law requiring the circuit courts to undertake administrative duties regarding revolutionary pensions was void because it imposed "upon the courts powers not judicial." *Siebold*, 100 U.S. at 398. *Siebold*, therefore, does not purport to decide whether Congress may divest the Executive Branch of authority to appoint officials who carry out core executive functions. It merely decided, on the authority of the appointments clause, that vesting the appointment of election supervisors in a court did not violate the doctrine of *Hayburn's Case*.

Even were *Siebold* thought to bear more directly on the question whether officers belonging to one branch may appoint officers of another branch, it nevertheless does not support the independent counsel's position, because the Court did not hold that Congress may provide freely for such appointments. Rather, the Court exam-

ined the role of the election supervisors, which largely consisted in observing federal elections for Congress, and concluded that

> in the present case there is no such *incongruity* in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

Id. at 398 (emphasis added). The Court, in other words, could not readily determine to which branch the appointment most naturally belonged; the appointment seemingly could not have been made by any officer other than a judge "with any greater propriety." This point alone distinguishes the election supervisors from typical executive officers. *Ex parte Siebold* therefore does not suggest that Congress may vest the appointment of a purely executive officer, such as the independent counsel, in a court of law.

What kind of appointments then would, by virtue of their "incongruity," violate the appointments clause? We think it must be incongruous if an officer of one branch is authorized to appoint an officer of another branch who is assigned a duty central to the constitutional role of that other branch.[28] The independent counsel's contention that

[28] The only exception to this principle is that Congress may authorize the Executive Branch or the courts to appoint Congress' officers. There is no incongruity, as *Siebold* implicitly recognized, in Congress' authorizing either the executive or the courts of law to appoint congressional officials. *See Buckley v. Valeo*, 424 U.S. at 138-39. Such a device does not implicate separation of powers, because Congress maintains ultimate control, through legislation, over the appointment process.

she can be constitutionally appointed by a court necessarily suggests, as was extensively explored at oral argument in this and previous cases raising the same issue, the opposing general proposition that the appointments clause is no barrier to legislation authorizing inter-branch appointments.[29] That is to say, a court could be empowered to appoint all officers subordinate to a department head. (For purpose of considering this issue, we have assumed that the independent counsel is an inferior officer and we will further assume that principal officers include department heads and judges. If, for example, two-thirds of the House and Senate—a sufficient number to override a veto—disagreed strongly with the President's agricultural policy, Congress could place in a particular court, perceived as more in agreement with Congress' policy views, the authority to appoint all Department of Agriculture officers subordinate to the Secretary. That device would neatly prevent the President from implementing his own agricultural policy. Or more shocking, because of the President's Commander-in-Chief and foreign policy functions, Congress could employ the same technique to prevent the President from exercising effective control over either the State or Defense Department. It is difficult to see, if the independent counsel is correct concerning inter-branch appointments, why Congress could not delegate to a particular court—perhaps by a definition that fitted only one district judge—the appointment of all Executive Branch officers (save department heads).[30]

[29] It is not even clear that Congress can provide for interdepartmental appointments. *See supra* p. 33. But, of course, that issue is not before us.

[30] One might ask why, if Congress had lost that degree of confidence in the President, it would not simply have used its impeachment power. That latter course, however, might in certain circumstances seem less attractive because of the need, albeit perhaps more political than legal, to find a high crime or misdemeanor.

Perhaps more plausible, however, is a scenario closer to the one presented by this case. Let us assume that Congress has lost confidence in the President's policy implicating only one subject matter within a department's jurisdiction—perhaps U.S. policy towards Latin America, or arms control negotiations, or the Executive Branch's presentation of cases to the Supreme Court. Under the independent counsel's view, Congress would face no constitutional impediment in requiring that a particular court appoint the officials responsible for implementing those policies. And as with the Act before us, Congress could forbid *any* other Executive Branch official to interfere with the special appointee's jurisdiction.[31]

Or reversing the inter-branch appointment device, Congress, if it had the constitutional authority the independent counsel asserts and was dissatisfied with the trend of federal judicial decisions, might place authority to appoint all inferior judicial officers including Justices' and judges' clerks in one department head (perhaps the Attorney General), thereby hoping to influence opinions or at least to obstruct the perceived undesirable trend.[32]

It seems obvious to us that all of these examples are so at odds with the doctrine of separation of powers or the President's unitary executive authority as to be plainly contrary to our Constitution. The independent

[31] Counsel for the House of Representatives at oral argument insisted that Congress could require court appointment of the Solicitor General, but was uncertain whether the President could be forbidden the opportunity otherwise to communicate his legal views to the Supreme Court by an amicus brief.

[32] If, as the independent counsel argues, judges and department heads are only inferior officers and the Attorney General was deemed more sympathetic to congressional views than the President, the Attorney General could be given plenary authority to appoint all federal judges.

counsel and various amici contend that it is unnecessary to consider these hypotheticals to hold the independent counsel's appointment constitutional, but we do not understand why that is so since the interpretation of the appointments clause offered by the independent counsel would flatly permit Congress' authorization of inter-branch appointments. Of course most judges have a good deal more experience with criminal prosecution than with foreign affairs, so the independent counsel suggests that it is less incongruous for a court to appoint an independent counsel than, let us say, a diplomatic special envoy, but her position would, even if we could detect its principled limits, surely at least permit court appointment of all Justice Department lawyers—including the Solicitor General—who either appear before the federal courts or supervise those who do.[33] And even that necessary extension of the independent counsel's argument seems so to burden her argument with blatant unconstitutional weight as to sink it.[34]

Nor do we think *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987), is authority, as the independent counsel claims, for judicial appointment of federal prosecutors. In that case the Supreme Court

[33] Our dissenting colleague seems to suggest that the plan she cites from an early draft of the first Judiciary Act to have the Supreme Court appoint the Attorney General would be constitutional. Dissent at 34-35 n.41. *See* discussion *supra* p. 35. Apparently then she would have little problem with at least one part of this hypothetical.

[34] The dissent offers no principle upon which incongruity can be judged but rather contends that *Congress'* notion of incongruity, measured by the purpose of the statute, is determinative in interpreting the Constitution. Dissent at 35-36. That is consistent with our dissenting colleague's primary themes that the Act should be upheld because it redresses a constitutional imbalance of power, *compare infra* pp. 64-65, and that Congress' interpretation of the Constitution is due judicial deference, *compare supra* note 20.

sanctioned the practice of federal judges appointing disinterested private attorneys to prosecute contempt actions based on perceived violations of a judge's own orders because "the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function." *Id.* at 2131. Since a court could not constitutionally compel a United States Attorney to prosecute (the relevant United States Attorney's Office had actually expressed disinterest, *id.* at 2129), the court would otherwise be unable to assure the effectuation of its orders. Indeed, the Court's decision rests on its appreciation for separation of powers and the unfettered discretion of the Executive Branch to determine whether to prosecute crimes. The Court observed that "[t]he fact that we have come to regard criminal contempt as 'a crime in the ordinary sense' does not mean that any prosecution of contempt must now be considered an execution of the criminal law *in which only the executive branch may engage*. . . . [T]hese proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court." *Id.* at 2133 (emphasis added) (citation omitted).

In sum, we think the Constitution generally precludes inter-branch appointments. For the reasons further elaborated in Parts IV and V of this opinion, moreover, court appointment of prosecutors presents a more fundamental incongruity with our constitutional scheme than virtually any other type of inter-branch appointment, because it blurs that cherished separation of prosecutor and judge which is a crucial aspect of the Constitution's protection of individual liberty.

B.

The Act further trenches on the concept of a unitary executive and departs from separation of powers doctrine by substantially limiting the President's ability to

remove or supervise the independent counsel.[35] It provides that an independent counsel "may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1). The Act places further restrictions on the President's removal and supervisory powers, including an extraordinarily broad provision authorizing the Special Court to review removal decisions of the Attorney General and explicit limitations on the Attorney General's authority to supervise the independent counsel. We discuss the "good cause" provision first, however, because we believe that, standing alone, it is a significant enough restriction to raise serious constitutional questions.[36]

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[35] We consider this issue, like the inter-branch appointment issue, assuming arguendo that the independent counsel is an inferior officer.

[36] Although no independent counsel has been removed to date, consideration of the impact of these restrictions is now ripe because the tenure they create for the independent counsel has a "here-and-now" impact upon the appellants. *See Bowsher v. Synar*, 106 S. Ct. 3181, 3189 n.5 (1986). The issue can be considered from two points of view. In one sense, the question of ripeness before us is identical to that framed by the *Bowsher* Court; the restrictions on removal, as we will show, place the Special Court in a position of power over the independent counsel, thereby "creat[ing] the here-and-now subservience to another branch that raises separation-of-powers problems." *Id.* (quoting *Synar v. United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)). From a different perspective, the issue here is the mirror image of that in *Bowsher*, because the removal restrictions grant the independent counsel a "here-and-now" *freedom* from supervision and control by the President inconsistent with the constitutional doctrine of a unitary executive.

The dissent agrees that the removal restrictions are ripe save any consideration of the Special Court's scope of review. *See* Dissent at 11-12 n.15; *compare* pp. 53-56 *infra*. It seems

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Power to remove an executive officer is important principally because it permits the President to control the performance of that officer. *See Synar v. United States*, 626 F. Supp. 1374, 1400 (D.D.C. 1986). Even more than the appointment power perhaps, authority to remove an officer who strays from the President's desired policy direction guarantees the President the ability to channel that officer's course of action. As Madison said in the First Congress:

> If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.

1 ANNALS OF CONG. 499 (J. Gales ed. 1789); *see also Myers v. United States*, 272 U.S. 52 (1926).

The Constitution, to be sure, does not require that every officer of the United States be removable at the will of the President. The civil service laws, designed to abolish the spoils system—to have merit rather than politics govern the appointment and tenure of civil servants—restrict the President's removal power. *See Myers*, 272 U.S. at 174. Politics, however, is in one sense policy, and civil servants are not thought to be the President's policymakers. Rather, they take direction in their discretionary duties from the political appointees of the President who help the President fashion and execute

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to us, however, that even the dissent's limited tack still sails directly into the *Bowsher* wind. To ask, as does the dissent, whether it is likely that the independent counsel would have actually behaved differently under a more restricted scope of review is equivalent to asking, as the Court refused to do in *Bowsher*, whether one could identify the manner in which a Comptroller General's behavior would be modified if Congress did not have some control over his removal.

his policies. *See Elrod v. Burns*, 427 U.S. 347, 367 (1976) (plurality) ("Limiting patronage dismissals to policymaking positions is sufficient to [implement policies of new administration]. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party."). Members of the civil service enjoy protection against removal largely because of their limited role. *See* Gifford, The Separation of Powers Doctrine and the Regulatory Agencies After *Bowsher v. Synar*, 55 GEO. WASH. L. REV. 441, 467 (1987) ("As room for policy formulation increases, congressional limitations upon presidential influence become problematic.").

In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court recognized another limitation on presidential removal power. *Humphrey's Executor* corrected the suggestion found in *Myers* that every officer appointed by the President with the advice and consent of the Senate must be freely removable by the President. The Court recognized that "it is within the power of Congress under the 'Necessary and Proper' Clause, Art. I, § 8, to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control." *Bowsher v. Synar*, 106 S. Ct. 3181, 3206 (1986) (White, J., dissenting) (discussing *Humphrey's Executor*).

Humphrey's Executor, however, has not been read to validate every removal restriction. *See Morgan v. Tennessee Valley Auth.*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941). The *Humphrey's Executor* Court itself was careful to limit its holding to officials who had "quasi-legislative or quasi-judicial" powers, leaving the decision in *Myers* intact insofar as it related solely to "purely executive officers." *Humphrey's Executor*, 295 U.S. at 629, 632. *Humphrey's Executor* is therefore noteworthy partly for what it does *not* say. Faced

with the task of distinguishing the case before it from *Myers*, the Supreme Court did not limit *Myers* by noting that the statute at issue there allowed the Senate to control the removal of an executive officer, whereas the Senate retained no role at all under the statute at issue in *Humphrey's Executor*. Nor did the Court distinguish *Myers* on the basis that in that case the President had no power without Senate consent to remove the officer, whereas in *Humphrey's Executor* the President had at least the power to remove for cause. The Court deliberately chose not to rely on these differences; it read *Myers* as an absolute prohibition on any restriction of the President's power to remove a purely executive officer whom he had appointed. Instead, the Court validated the removal restriction in *Humphrey's Executor* because the Federal Trade Commissioners were not purely executive officers, but rather performed quasi-judicial and quasi-legislative functions.[37]

Although *Myers* and *Humphrey's Executor* both concerned officers who were appointed by the President, whereas the independent counsel was appointed by the

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[37] We disagree with the dissent's contention that *Humphrey's Executor* and *Weiner v. United States*, 357 U.S. 349 (1985) treat removal restrictions based on congressional notions of the need for independence rather than by the Court's characterization of the officer's function as non-executive, for both cases closely analyze the precise role of the officers involved. Dissent at 26-27. The Court in *Weiner* was particularly explicit about the importance of this characterization: "[T]he most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission." 357 U.S. at 353. And in *Weiner* this analysis was uncomplicated—the War Commissioners were judges, pure and simple. Judges, like members of the civil service, *see supra* pp. 44-45, are not thought of as policymaking officials. "[P]olicy arguments are more properly addressed to legislators or administrators, not to judges." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864 (1984). *See also Gifford, supra* p. 45, at 466.

Special Court, we think the Supreme Court's analysis of the President's removal power in both cases applies to an officer who, like the independent counsel, is charged with an indisputably executive function. The independent counsel argues that because she is an inferior officer not appointed by the President, Congress may restrict her removal under the reasoning of *United States v. Perkins*, 116 U.S. 483 (1886). *Perkins* was a suit by a Navy cadet-engineer to recover pay accruing after he was discharged by the Secretary of the Navy in contravention of a law forbidding discharges in peacetime except by court-martial. The Supreme Court adopted the language of the Court of Claims, which said that "[w]e have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." *Id.* at 485. Although appointed by a court rather than a department head, the independent counsel maintains the same reasoning applies to her. An officer's removal may be restricted, we are told, if the officer was not appointed by the President in the first place. But it cannot be that a restriction on the power of the President to remove an officer appointed by him, a restriction that under *Myers* unconstitutionally interferes with the President's duty to oversee the execution of the law, becomes constitutional if the power of appointment as well is removed from the President and all other members of the Executive Branch. Depriving the Executive Branch of appointment power *increases* rather than decreases the Act's interference with the President's prerogatives. Accordingly, in *Humphrey's Executor*, the Court treated the President's power to appoint the FTC Commissioners as a factor to be weighed *against* the argument that a restriction on removal encroached upon the President's executive authority. The Federal Trade Commission was meant by Congress to "be independent of executive authority *except in its selection*." 295 U.S. at 625 (emphasis in original). This point has

been reemphasized in subsequent Supreme Court discussions of the case. *See Bowsher*, 106 S. Ct. at 3195 n.2; *Buckley v. Valeo*, 424 U.S. 1, 136. The independent counsel thus turns the proper analysis of the relationship between the President's appointment and removal powers on its head. In that regard, it should not be overlooked that in *Perkins* the officer in question was appointed by a member of the Executive Branch, and therefore the President retained at least indirect control over his selection.[38] Furthermore, the cadet-engineer, like a civil servant, was not himself charged with carrying out an executive function that required the exercise of policy discretion. So *Perkins* in our view is wholly inadequate support for the independent counsel's defense of the statute's removal provisions. *See Myers*, 272 U.S. at 161 ("The *Perkins* case is limited to the vesting by Congress of the appointment of an inferior officer in the head of a department.").

To be sure, Supreme Court Justices have expressed dissatisfaction with the distinctions drawn in *Humphrey's Executor*. *See, e.g., Bowsher v. Synar*, 106 S. Ct. at 3207 n.3 (White, J., dissenting); *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting). They contend, not without force, that the FTC Commissioners' duties included law enforcement responsibilities and so *Humphrey's Executor*'s reliance on the Commissioners' quasi-judicial and quasi-legislative functions is inadequate to explain the case—and to limit its future applicability.

Even under this alternative reading, which recognizes certain executive functions performed by the FTC,

[38] Of course, the President, as the Commander-in-Chief of the Armed Forces, had the power to give Perkins a lawful order, the refusal of which would result in court-martial and removal. Thus the statute considered in that case did not significantly impair the President's ability to control and direct the officers of the Executive Branch.

Humphrey's Executor cannot, it seems to us, sanction the Act's good cause removal limitation. In *Humphrey's Executor*, the Commissioners were described as a "body of experts" whose purpose was "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." 295 U.S. at 625, 628. An important part of the Commissioner's role was to flesh out the very general legislative standard contained in the FTC Act. The Federal Trade Commission therefore was part and parcel of the very statute it was assigned to enforce—it actually created the law of fair trade in the course of adjudicatory enforcement proceedings.[39] "If all [the FTC] has to do is to order the literal statute faithfully executed, it would exercise a function confided exclusively to the President and would be subject to his control." *FTC v. Ruberoid Co.*, 343 U.S. 470, 488 (1952) (Jackson, J., dissenting). According to that view then, the Federal Trade Commission Act did not divest the President of his constitutional duty to oversee the execution of the law because "any such duty [was] necessarily limited to a great extent by the content of the laws enacted by the Congress," *Bowsher*, 106 S. Ct. at 3207 (White, J., dissenting), and part of the "content" of the fair trade law is the Commission itself. That analysis simply does not apply to the Ethics in Government Act because this statute entrusts enforcement of a *pre-existing* body of criminal law to an official neither appointed nor removable by any member of the Executive Branch. What is more, the independent counsel has no legislative or judicial role regarding the United States criminal code; her only respon-

[39] When *Humphrey's Executor* was decided, the FTC had not asserted any rulemaking authority. *See Strauss, supra* note 22, at 615. Thus, there was in fact no separate body of law for the FTC to enforce independent of that law which was created through the enforcement procedure itself.

sibility is to execute it, and that is a responsibility the Constitution assigns unequivocally to the Executive Branch. *Cf. Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (danger of encroachment on the Judicial Branch is less when matters removed from the jurisdiction of Article III courts concern rights created by Congress that could constitutionally be addressed by Congress itself). *Humphrey's Executor* does not even suggest that a statute which excludes the President from the enforcement of preexisting law would be constitutional.

No party or amicus before this court denies that the independent counsel is a "pure" executive officer. The issue is, in any event, foreclosed by *Bowsher*, in which the Court said "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law" and the exercise of judgment "concerning facts that affect the application of the [law]" is another characteristic of the executive function. 106 S. Ct. at 3192. The independent counsel is a fortiori an executive officer under this definition. She must determine whether the facts uncovered in her investigation may constitute illegal conduct; in order to make this judgment, she must "interpret[] a law enacted by Congress." Those legal interpretations and law enforcement functions exercised by the independent counsel carry more—much more—executive discretion than the specific duties of the Comptroller General involved in *Bowsher*; no one asserts that her duties—as was claimed of those of the Comptroller General—are "essentially ministerial and mechanical." *Id.*; *see Wayte v. United States*, 470 U.S. 598, 607 (1985).

Although he has frequently dissented from cases overturning laws on separation of powers grounds and has advocated a pragmatic view of the separation of powers doctrine, Justice White has repeatedly stressed the core

executive nature of the prosecutorial function and the consequent importance of ensuring that the President retain the power to remove core executive officers at will. *See, e.g., Bowsher*, 106 S. Ct. at 3207 (White, J., dissenting) ("[T]here are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President."); *INS v. Chadha*, 462 U.S. 919, 1002 (1983) (White, J., dissenting) ("A legislative check on an inherently executive function, for example, that of initiating prosecutions, poses an entirely different question."); *Buckley*, 424 U.S. at 285 (White, J., concurring in part and dissenting in part) ("I would be much more concerned if Congress purported to usurp the functions of law enforcement . . . .").

Like Justice White, we cannot see how prosecution of federal criminal law can be other than an inherent, or core executive function. It was suggested at oral argument, however, that because the Constitution does not mandate the creation of lower federal courts, but leaves that decision to the discretion of Congress, it was not inevitable that there would even be federal prosecutors, much less that the prosecutorial function was placed in the Executive Branch. But the Framers did foresee that the new government they were establishing would sometimes need to enforce its laws through criminal prosecutions. They actually provided in important detail for the procedure to be used in such cases—the Constitution directs that all federal criminal trials shall be by jury and "shall be held in the State where the said Crimes have been committed." U.S. Const. Art. III, § 2, cl. 3. If no lower federal courts had been created, then federal crimes would have been prosecuted by federal prosecutors in the State courts, in which case the Supremacy Clause would obligate state court judges to apply federal law. *See generally Testa v. Katt*, 330 U.S. 386 (1947); *Claflin v. Houseman*, 93 U.S. 130 (1867); THE FED-

ERALIST No. 82 (A. Hamilton). Nothing in the Constitution gives Congress the power directly to require state officers to enforce federal criminal law, *cf. Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107-08 (1860), overruled by *Puerto Rico v. Branstad*, 107 S. Ct. 2802 (1987) (mandamus lies in federal court to require a state officer to comply with a ministerial—not discretionary—constitutional duty),[40] and any attempt to do so would conflict with concepts of federalism, state sovereignty, and the Tenth Amendment. So at the outset the Framers must have foreseen the necessity of officers of the United States commissioned to enforce federal criminal law.

We think it inevitable that under the Constitution such officers must be members of the Executive Branch subject to the control of the President. In contrast to the limited grants of legislative power made in Article I, Article II grants authority to the President in broad terms. "[t]he executive Power shall be vested in a President," U.S. Const., art. II, § 1, and does not individually list all his various duties, but it does specifically require that he shall be the Commander-in-Chief of the armed forces and that he may make treaties with the advice and consent of the Senate and receive ambassadors. *Id.*, § 2. It also directs the President to "take Care that the Laws be faithfully executed." *Id.*, § 3. The dissent's suggestion that this provision is only a limitation on the President's authority—that the President is required to execute only those laws that Congress delegates to him—implies that all sorts of executive officers could be delegated authority to enforce laws beyond the President's control or influence. Dissent at 14 n.19. That would mean that Congress could restrict presidential removal, as far as we can discern, of virtually any executive officer. We

[40] *FERC v. Mississippi*, 456 U.S. 742 (1982), is not to the contrary. It holds that a state quasi-judicial administrative agency can be compelled, like a state court, to apply federal law and conform to federally-mandated procedures. *Id.* at 760-61.

think that interpretation of the Constitution is utterly implausible besides being palpably inconsistent with *Myers* and *Humphrey's Executor*. We conclude rather that the Constitution envisioned two core domains of presidential responsibility—foreign affairs and law enforcement and it is apparent from the structure and language of the Constitution that the initiation of a criminal prosecution in our federal system is entrusted to the President. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *United States v. Nixon*, 418 U.S. 683, 693 (1974).

2.

Even if a simple "good cause" restriction on the President or his subordinate's removal power over the independent counsel were constitutional, this statute, prior to its recent amendment, restricted Executive Branch authority a good deal more than the normal "good cause" limitation.[41] Its delegation to the Special Court to "re-

[41] As the dissent notes at 11, Congress, after oral argument in this case, modified the removal provisions of the Act. Judicial review of removal of an independent counsel has been transferred from the Special Court to the federal district court and the scope of review has been narrowed. It has been suggested that this legislative change, made after appellants were held in contempt based on the district judge's determination of the constitutionality of the statute before amendment, renders the prior challenge to the removal provisions not ripe even if originally ripe. Supplemental Brief of Amicus Curiae United States Senate. But if the "here-and-now" impact of the original removal provisions in inducing independent counsel subservience to the Special Court made consideration of that provision ripe at the time appellants raised their challenge below, *see supra* note 36, Congress could not, by subsequently changing the removal provisions, affect the ripeness of the original challenge or the appeal from the contempt order. Nor do we, unlike the dissent, believe that Congress' subsequent "clarification" of the scope of review, by amending the original language, has any bearing on our interpretation of that original language as challenged by appellants in the contempt proceeding.

view" the Attorney General's dismissal of the independent counsel so diminished the Attorney General's removal authority as to render it almost illusory. Any review, regardless of scope, might be problematic because the court which reviewed the dismissal is the very court that appointed the independent counsel and for that reason, of course, "might well be expected to view [her] as its protege." *In re Sealed Case*, 829 F.2d at 65 (Williams, J., concurring and dissenting).

The scope of review, however, is quite extraordinary—given the probable nature of an Attorney General's decision to remove an independent counsel. Reinstatement may be ordered if the "removal was based on error of law *or fact*." But such a decision would likely turn on issues of public policy, for example the appropriate limitations to be placed on a prosecutor's zeal, that are beyond traditional judicial competence. *See Federal Radio Comm'n v. General Elec. Co.*, 281 U.S. 464, 469 (1930). If reviewed at all, these kinds of Executive Branch determinations are normally examined under a deferential arbitrary and capricious standard because of concerns for separation of powers. *See Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276-77 (1933). *See generally* 4 K. DAVIS, ADMINISTRATIVE LAW § 29.10 (1958) (a system of review that requires a federal court to merely repeat the decision process of an administrative or legislative agency violates Article III; this discussion omitted from later editions). By authorizing review of any question of law or fact, Congress invites the Special Court to determine what facts are relevant and thereby implies that the Special Court has authority to determine for itself the appropriate standard against which the independent counsel's conduct is to be measured. That scope of review would seem to exceed even de novo, which as we have recently held, limits a court "to make anew the same judgment made by the agency," *Doe v. United States*, 821 F.2d 694, 698 (D.C. Cir. 1987) (*en banc*) and to apply the same standard applied by the agency, *id.*[42]

Nothing in the Act, moreover, indicates that the Special Court's "review" is restricted to the record before the Attorney General at the time of the removal decision; indeed, since such a decision would typically be made for policy reasons, and not because some fact appears in a hypothetical record, review of the record seems anomalous in this context. At oral argument, counsel for the independent counsel suggested that an evidentiary record might be created before the court itself in a civil action brought by a discharged independent counsel, 28 U.S.C. § 596(a)(3), which further suggests that the court could consider information not before the Attorney General when he made his decision.[43] *Cf. United States v. Bianchi & Co.*, 373 U.S. 709, 714-15 (1963) ("reviewing function is one ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based"). In truth, because the Special Court has more of a supervisory role over the independent counsel than does the Attorney General, the Special Court, when it reviews his removal decision, might well have more or different information even before such a proceeding than did the Attorney General when he initially made the decision. In this context the word "review" is a misnomer; the Special Court is basically a "superior and revising agency" with a veto over the Attorney

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[42] For this reason, the scope of review may itself be unconstitutional, but we need not reach that issue. Scope of review is relevant to our discussion because of its "here and now" impact on the Attorney General's perceived power to remove the independent counsel.

[43] Although it does not appear that most decisions of the Special Court are directly reviewable by the Supreme Court or any other court, we assume that because section 596(a)(3) authorizes the independent counsel to bring a civil action, an appeal to the Supreme Court would lie.

General's decision. *See General Elec. Co.*, 289 U.S. at 357.

This scheme is analytically indistinguishable from one whereby the Attorney General could remove the independent counsel only by petitioning the Special Court for a termination order which the Special Court could grant or not following its own independent investigation of the facts and the law. The only difference between such a hypothetical statute and the Act is the timing of the Special Court's "review," but the Special Court's power to appoint an interim independent counsel while it reviews a dismissal renders the matter of timing inconsequential. *See* 28 U.S.C. § 593. Hence, we think it likely that any order by the Attorney General to an independent counsel, even if backed by a threat of removal, would be ineffectual, unless the independent counsel believed the Special Court would itself agree with the order. The result of this "double key" system is therefore that the Attorney General is powerless to remove the independent counsel unless he can win the consent of the Special Court. We have then almost a precise analogy to *Myers*, where, under the statute declared unconstitutional, the President could not remove the postmaster without the concurrence of the Senate.

3.

The "good cause" limitation on removal, coupled with the Act's extraordinary judicial review provisions and the power of the Special Court to appoint an interim independent counsel and to reinstate a fired independent counsel compromise the President's ability to oversee the execution of the law. Not content with eliminating the President's implicit power to direct or influence the independent counsel, Congress went even further to render the President impotent to affect the independent counsel's behavior. From the moment an independent counsel is appointed, the Act, which guarantees the independent

counsel "independent authority" to carry out her duties, 28 U.S.C. § 594(a), ensures that the Attorney General cannot influence any aspect of her performance, including the scope and duration of the investigation, the standards to be applied in making a decision to prosecute or not, the direction of the investigation when competing executive concerns are implicated, or, on a more mundane, but nevertheless important level, details about staffing and budgetary matters.

The independent counsel is free to ignore Department of Justice policy if it is "not possible" to follow it, and that judgment is for her alone to make. 28 U.S.C. § 594(f). The consequence of this scheme, (described in more detail in Part IV), is that targets of an independent counsel may be subjected to investigations and prosecutions governed by rules different from those that apply to the investigation of any other citizen and therefore it strikes at the very heart of the unitary executive doctrine, which has as a primary purpose the "unitary and uniform administration of the laws." *Myers*, 272 U.S. at 135.

As we further discuss in Part V, important decisions about the scope of the investigation and the very identity of the targets are made not by the Attorney General, but by the Special Court. The absence of Executive Branch supervisory authority is perhaps most troubling when an investigation veers toward matters affecting international relations and the independent counsel adopts positions at odds with the remainder of the Executive Branch. For example, in another investigation under the Ethics in Government Act that has previously been before this court, the independent counsel attempted to subpoena the Canadian Ambassador in the face of strenuous opposition by the Department of State on this delicate diplomatic question. *See United States v. Deaver*, No. 87-096 (D.D.C. June 22, 1987). And in oral argument before this court regarding still another independent

counsel investigation, we were advised that in the event of a dispute between the independent counsel and the President over foreign policy and its implications for a prosecution, the independent counsel would 'in principle' prevail over the President. Tr. of Oral Argument in *In re Sealed Case*, June 3, 1987.

In sum, Congress has created an Executive Branch office to perform a core presidential function and as far as we can determine precluded the President from exercising any influence over the performance of that office even when its performance might interfere with a range of other Executive Branch responsibilities, including those national security duties directly and solemnly entrusted to the President for the protection of all Americans.

C.

We have, up to this point, considered the Act's provisions individually, examining in turn the appointment, removal, and supervisory sections of the Act. We believe each of these provisions to be a departure from the related doctrines of separation of powers and of a unitary executive, but we acknowledge that this area of the law is not marked by distinct guideposts. *See INS v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring in the judgment). We therefore are obliged to consider how much of an intrusion into the executive function or how great a departure from the doctrine of separation of powers is consistent with the Constitution. *See Nixon v. General Servs. Admin.*, 433 U.S. 425, 443 (1977). We are well aware that the doctrine of separation of powers is not a matter of absolutes; the Constitution does not require "a hermetic sealing off of the three branches of Government from one another." *Buckley*, 424 U.S. at 121.[44] And so, seemingly plausible argu-

[44] Justice Jackson gave the classic warning against a rigid invocation of separation of powers:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

ments can be made that the Act's various limitations on executive power are, considered in isolation from each other, different only in degree from limitations that have been upheld in the past.

Yet, in the end, even if some executive officers may constitutionally be appointed by judges, or may constitutionally be insulated to some extent from removal and supervision by the President, we think it tenuous to claim that any officer may be entrusted with all the powers of the Attorney General,[45] indeed of the President, and charged with the exclusive enforcement of the criminal law as applied to specific individuals. *Cf. Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986), (Court regarded as key to its separation of powers analysis whether or not Congress had entirely withdrawn a function from the cognizance of the branch to which it is constitutionally assigned, *id.* at 3260, and whether the body to which some part of one branch's responsibilty has been assigned can exercise substantially all of the powers of that branch, *id.* at 3258). We are, as we have concluded, concerned with one of the President's core executive functions, explicitly provided in the Constitu-

[45] The only power of the Attorney General not given to the independent counsel is the authority to apply to a federal judge for a wiretap. 28 U.S.C. § 594(a).

tion, that he take care that the laws be faithfully executed. The Act considered as a whole thus strikes us as a serious encroachment on the President's executive authority, and we turn now to consider whether this encroachment can be justified.

IV.

The primary defense of the constitutionality of the Act presented by the independent counsel and supporting amici is one of necessity. We are told that Presidents can no longer be trusted to ensure that their senior appointees obey the criminal laws. The independent counsel claims that "the constitutional crisis which grew out of Watergate is a sufficient demonstration that without a mechanism to achieve this goal, there is grave question whether we are in fact 'a Nation capable of governing itself effectively,'" (quoting *Buckley*, 424 U.S. at 121). This argument is sometimes cast in terms of an institutional lack of confidence in the Justice Department:

> [F]ifty years of the nation's history involving the Teapot Dome, Truman Administration, and Watergate scandals, has demonstrated a generally recognized inability of the Department of Justice and the Attorney General to function impartially with full public confidence in investigating criminal wrongdoing of high-ranking government officials of the same political party.

In re Olson, 818 F.2d 34, 42 (D.C. Cir. Indep. Couns. Div. (1987)). But the argument is really directed at the Presidency itself, for so long as the President takes care that the laws be faithfully executed, we see no reason why he cannot ensure that his Attorney General and senior officials in the Justice Department follow his lead. A good example of such presidential action arose during the very Truman administration scandals referred to by the Special Court. After the Attorney General improperly discharged the special prosecutor he had appointed,

President Truman in turn removed the Attorney General. Of course the Attorney General might, on his own, or by direction of the President, determine that for appearances' sake or because of an actual conflict of interest a special prosecutor or independent counsel should be appointed for a particular investigation, buttressed perhaps with an independence guaranteed by regulation. That device has been employed and its legality tested and affirmed. *See United States v. Nixon*, 418 U.S. 683 (1974).[46]

The President then has a range of choices and techniques to ensure that corruption at senior levels in his administration is deterred and, if not deterred, punished. Clearly this statute is based on the premise that the President himself cannot be trusted to choose wisely among these options. Or that even if he could, the institutional conflict of interests in which he is placed is so intolerable as to suggest the need after two hundred years for a novel government agency that removes the appearances of conflict. But it is by no means clear to us that this ostensible problem is truly a conflict of interest. We had not previously thought that the obligation upon any executive—let us say the President of a corporation or a Union—to ensure probity among his subordinates presents a conflict of interest as we judges and lawyers think of the meaning of that phrase. It is surely never easy to effect the removal or prosecution of trusted subordinates; in human terms alone the discomfort can be intense. But that discomfort is hardly a conflict of interest. Otherwise, the independent counsel device would seem to be needed as an attachment to all bureaucratic institutions in our society.

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[46] Or Congress might create an "independent" prosecutorial office to be filled by an officer appointed by the President (and under his supervision) with the advice and consent of the Senate. Such an office was created during the Teapot Dome scandal of the Harding administration. 43 Stat. 16 (1924).

It is suggested, however, that the conflict of interest is a political one. The President would be reluctant to see his Justice Department proceed against senior administrative appointees because his relationship with these officials involves more than mere ties of personal loyalty—such as could be found in any bureaucratic institution—it comprehends political allegiances and therefore such a prosecution may politically damage the President himself. Hence the President cannot be trusted to make decisions regarding matters that may threaten the political goodwill he has accumulated in his public life and upon which he depends for his continued success. As a principle to justify the use of congressional power to deprive the President of prosecuting authority, however, this contains no feasible limitation. Why could Congress not, according to this notion, require an independent counsel whenever the target of inquiry were a political ally of the President: Senator, Congressman, Governor, campaign contributor, or in fact any person active in affairs of the President's party? Nor do we see, if political allegiance really does generate a conflict of interest, why the argument cannot just as easily be made also to support the opposite application—that the President be deprived of authority to prosecute his political adversaries. If we follow this political conflict of interest reasoning to its logical end, it points to the desirability of removing the Department of Justice entirely from presidential influence—which we think must be a constitutional reductio ad absurdum.[47]

At bottom, then, the statute's necessity must be predicated on Congress' concern that a personally corrupt President would be reluctant to attack malfeasance within

[47] Senator Ervin once introduced a bill that would have taken the Department of Justice out of the Executive Branch and made it independent (although even that bill would have retained presidential appointment authority). S. 2803, 93d Cong., 1st Sess. (1973).

his own Administration. The Watergate crisis is, of course, the statute's genesis and it is in order to spare the country a repetition of that "long national nightmare" that the statute has been enacted. That justification assumes, wrongly we think, that prosecuting Presidents can somehow be made relatively painless. We do not see how such an eventuality can, no matter what structural techniques are employed, be other than a national nightmare.

The Framers were not oblivious to the concerns that gave rise to this legislation. By providing Congress with the impeachment power, and declining to extend the President's pardon power to cases of impeachment, the Constitution grants to Congress the power, if needed because of criminal behavior, to discipline the President and all of his appointees. The impeachment clause and the limitation on the President's pardon power not only demonstrate that the Framers did not ignore the problem of wrongdoing in high places; these provisions further suggest that the balance between the need for official accountability for criminal acts and the prerogative of the President to oversee the execution of the laws was struck in the Constitution itself. Although the power to impeach has been used only sparingly, it has been explicitly directed against two Presidents. More importantly, however, it hangs over the Executive Branch as a brooding omnipresence, often forcing Presidents to take action that they might wish to avoid. After President Nixon caused one special prosecutor to be discharged the resulting uproar—and the explicit threats of impeachment—compelled him almost at once to acquiesce in the appointment of another, who was given full authority to pursue criminal charges against the President himself.

As did the Supreme Court in *Myers*, 272 U.S. at 164-67, 175, we note that the legislation before us was passed in the midst of a period when one political party tended to control the Presidency and the other enjoyed dominance in the Legislative Branch. It is of course con-

ceivable, without in the slightest degree impugning congressional motives, that this long-standing political division has subtly contributed to the inevitable tension between the political branches and thus perhaps played a role in the perceived need for this legislation. Ironically, however, the impeachment power is a good deal more credible threat when Congress is controlled by one party and the Presidency by the other. Certainly history bears out that observation. That means the Act may well have been passed at a time in American history when its need, even assuming the validity of its defenders' positions, was least.

The dissent ostensibly does not accept the independent counsel's necessity argument. Dissent at 23 n.28. Our colleague suggests rather that since the Watergate abuses amounted to an effort by the President to alter the balance of power between the Presidency on the one hand and Congress and the Judiciary on the other, Congress is entitled to respond. The dissent does not explain in what manner these abuses "threatened the balance between the three branches of government," Dissent at 22, but, in any event, we would have thought the denouement of the Watergate affair hardly suggests the triumph of the Presidency over the other two branches. Furthermore, to say, as does the dissent, that the Act is constitutional since "no man can be a prosecutor or judge in his own case" and the Act merely "maintain[s] the executive's proper—and properly circumscribed—constitutional role," *id.* at 22-23, is either to accept the necessity argument or to assume the conclusion in this case.

Even were we persuaded that the legislation's "necessity" were great, however, we could not approve such a fundamental revision to our constitutional scheme. Congress itself seems to have been implicitly aware that the Act was designed to correct what it thought was a constitutional defect. The Senate Committee Report, cited by the independent counsel herself, suggests exactly that:

"The Committee believes that the dangers of conflict were not unique to Watergate, but rather are *inherent* in our system of government." S. REP. No. 496, 97th Cong., 2d Sess. 4 (1982) (emphasis added). Inherent indeed! The conflict of interest, such as it is, is found in the Constitution itself.[48] That is of course what we mean when we refer to the inherent qualities of our governmental structure. And " 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . .' " *Bowsher v. Synar*, 106 S. Ct. at 3193-94 (quoting *Chadha*, 462 U.S. at 944). The Supreme Court has not hesitated to hold laws or executive actions unconstitutional on separation of powers grounds, even when the actions taken or laws passed were in response to pressing national crises. *See, e.g., Bowsher*, 106 S. Ct. 3181; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In the end, the necessity argument fails because it is radically inconsistent with decisions taken at the beginning of our nation. As the Court said in *INS v. Chadha*, 462 U.S. at 959 (citation omitted):

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were con-

[48] That each branch enjoys power to favor itself as against other branches is endemic to our constitutional structure. The judiciary, for instance, cannot avoid passing on questions that directly affect its status and even its compensation. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *United States v. Will*, 449 U.S. 200 (1980). And the Congress typically legislates restrictions on conduct of Executive Branch officials yet exempts itself from those restrictions. *See, e.g.*, 42 U.S.C. § 2000e-16(a) (1982) (employment discrimination law applies to Executive Branch officials but is not extended to all congressional employees).

> sciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Congressional desire for more effective administration of the criminal law when high governmental officials are implicated cannot justify departure from a constitutional plan carefully calibrated to balance the need for law enforcement against concerns for individual liberty.

Next, the independent counsel suggests that this statute, unlike the statutes considered in *Chadha* and *Bowsher*, even if it encroaches upon executive authority, should be sustained because it does not explicitly add to Congress' powers. That portion of Executive Branch authority that is removed from presidential control does not, it is argued, directly enhance congressional authority. It is quite true that the Framers seemed most troubled by the prospect of a too powerful Congress. "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Bowsher*, 106 S. Ct. at 3189. And it is also true that Congress' role under the Act is limited to a non-binding call for the appointment of an independent counsel and the right to receive reports from that office. As has been previously suggested, however, "[u]nhitching the Independent Counsel from the executive may make the office naturally prone to domination by the branch that represents its primary competitor." *In re*

Sealed Case, 829 F.2d at 65 n.3 (Williams, J., concurring and dissenting).

But whether or not Congress can actually exercise subtle influence over, or give implicit direction to, an independent counsel, it seems simplistic to contend that Congress' political power in our system is unaffected by a diminution (or increase) in the Chief Executive's authority. If the President's authority is diminished—and we think it utterly impossible to deny that the Act accomplishes at least that result—Congress' political power must necessarily increase vis-a-vis the President. In practical terms, repeated calls for the appointment of a statutory independent counsel may, like a flicking left jab, confound the Executive Branch in dealing with Congress. An actual appointment, furthermore, surely saps the political vitality of the Presidency and thereby renders the President a less effective political force juxtaposed against Congress. In this very case, congressional calls for appointment of an independent counsel to investigate Executive Branch withholding of documents—based on executive privilege—seem to have been only a part of a broader, and not atypical, struggle between the political branches over the expenditures of appropriated funds in the shadow of an impending election. Of course those demands could occur in the absence of the statute, but the Act, by imposing a legal obligation (even if unreviewable by the courts, *see Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (en banc) (per curiam)) upon the Attorney General to seek an independent counsel if certain rather minimal conditions are met, surely alters the political equation.

Be that as it may, whether the effect of the Act is to transfer power to Congress is not determinative as to its constitutionality. The dissent, relying on *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986), contends that a "more fluid, functional approach" rather than a formalistic analysis is called for if—as is claimed

is true here—a statute siphons off from one branch but does not transfer to another. We have difficulty understanding why that principle, even if correct, would apply to this case, since, as we show, many of the Executive Branch functions have been quite explicitly transferred to the Special Court—a part of the Judicial Branch. But, in any event, we think the dissent overreads *Schor*. There the Court upheld a statutory scheme whereby a litigant before an independent adjudicatory agency, the Commodity Futures Trading Commission ("CFTC"), could bring a state common law counterclaim in a reparation proceeding pursuant to the Commodity Exchange Act. Prior opinions regarded adjudication of state common law claims as more obviously implicating Article III jurisdiction than did the adjudication of "public rights" claims. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-70 (1982). The Court in *Schor* allowed what perhaps had been thought to be exclusively Article III cases to be tried *in the first instance* before the administrative agency at the option of both parties. The judiciary, however, did not thereby give up any real power or prerogative; CFTC orders may only be enforced by a federal district court, where they are subject to a non-deferential standard of review (which is another way of describing supervision). That is why the Court thought the magnitude of any intrusion on the Judicial Branch "*de minimis.*" *Schor*, 106 S. Ct. at 3260. In sharp contrast, the Ethics in Government Act's purpose and effect are to deprive the President of *any* supervisory role over the independent counsel.

We think *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987)—upon which, paradoxically, the independent counsel relies—is more revealing as to how the Supreme Court treats a significant threat to a branch's power. As we have discussed, *see supra* pp. 41-42, the Court there concluded that judicial authority to initiate contempt proceedings was an inherent judicial

prerogative, else "the judicial power of the United States would be a mere mockery." *Id.* at 2131. If denying the judiciary's authority to initiate prosecutions for out of court contempts would make a mockery of judicial power, it surely can also be said that to deprive the President of all the Act does makes executive power a mere mockery.[49]

Finally, we are told by the independent counsel and supporting amici that only a small fraction of the President's authority is taken from him by the Act. We have had, however, and indeed now have, a considerable number of these independent counsel employing what appear to be sizeable staffs. We are not at all confident therefore that we could measure, if we thought it decisive, just how much presidential authority in terms of the number of investigations, actual or potential, is at stake in this case. We think the question irrelevant, however, because the independent counsel's argument ignores the primary purpose of the Constitution's deliberate separation of powers. It is not the quantity of cases or investigations withdrawn from executive supervision that is important, for a qualitatively significant encroachment upon the executive's control over even a single case may have a drastic impact on the individual involved. The constitutional doctrines implicated by this case do not concern merely questions of governmental organization and structure, but rather involve checks and balances that were designed "to protect the people from the improvident exercise of power." *Chahda*, 462 U.S. at 957. Separation of powers was considered by the Framers to be an "essential precaution in favor of liberty." THE FEDERALIST No. 47 at 323 (J. Madison) (J. Cooke ed. 1961). "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher*, 106 S. Ct. at 3191. That theme is repeated in *Schor*, where the Court, focusing on Article

[49] Otherwise *Vuitton* would stand for only a self-serving principle of "judiciary über alles."

III, recognized that an independent judiciary serves both institutional and personal interests, but the latter is the more important. *Schor*, 106 S. Ct. at 3256. Personal interests were not infringed by the statute upheld there because not a single litigant was obliged to have his common law claim adjudicated by the CFTC—the scheme was purely voluntary. One of appellant's counsel well expressed the essence of this concept: "If you look from the top down, as opposed to the bottom up, the chief defense of the statute of the independent counsel is it is only a little bit of executive power that is being taken away. If you look from the bottom up, from the accused person up . . ., all that accused person's protection that he was getting through three separate branches is taken away . . . ."

That very independence from presidential and Justice Department supervision and guidance that Congress deliberately fashioned for independent counsel has troubling consequences for those who find themselves the target of the independent counsel's attention. A person occupying this statutory office has, it seems to us, unique incentives to seek an indictment.[50] Our concern is based on the self-evident proposition that the whole *raison d'etre* of the independent counsel is not to administer the criminal law across a wide population, but rather to focus on one individual or group of individuals targeted at the inception of the office. In effect, an entire self-sufficient

[50] We do not refer primarily to economic incentives—the independent counsel and her staff remain on the government's payroll only so long as an investigation or prosecution is in progress. Most persons who occupy that office full time would, as is true with other senior government appointees, suffer a diminution in income. *But cf. Tumey v. Ohio*, 273 U.S. 510, 524 (1927) ("[I]n analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." (citing *Bonham's Case*, 8 Coke, 118a)).

government agency is created from scratch to investigate and perhaps prosecute a single individual. The need to justify even the expense of an office dedicated solely to one goal must generate a reluctance to decide against indictment or to conclude the investigation absent near certainty that no indictment is possible or that no further leads remain. And inevitably, the success of the office itself, in the public's eyes, at least, must turn to some extent upon whether indictment and conviction are obtained. The independent counsel is thus "subject to formidable public—and perhaps self-imposed—pressure to indict in the one case he was appointed to pursue."[51]

These incentives to prosecute might be thought also to affect a special prosecutor appointed by the Attorney General or the President. But, under the Act the independent counsel enjoys *statutory* immunity from supervision by anyone else in the Executive Branch and thus, unlike a special prosecutor appointed by the Attorney General and subject to his potential supervision, is free to ignore considerations normally included within the rubric of prosecutorial discretion and which may in a particular case all point to restraint. We have already mentioned powerful executive policy concerns, such as the foreign relations of the United States, that quite legitimately could influence the executive not to seek an indict-

[51] *Provision for Special Prosecutor: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 30 (1976) (prepared statement of Hon. Edward H. Levi, Attorney General).

We do not impugn the motives of this or any other independent counsel by describing the peculiar incentives to prosecute and the absence of countervailing constraints. We note, however, that the Constitution was not written by men who believed that the security of society would be well guarded by trust in the integrity of public officials. Our own life-long tenure was surely motivated by a fear of weak judges who would decide cases with an eye toward those who could otherwise remove them.

ment in a given case. More fundamental, perhaps, the independent counsel has no need to view a particular case in relation to similar cases, past or future. Wise exercise of prosecutorial discretion is dependent in part upon access to officials who are participants in the ongoing process of enforcing the law and who are able to take a longer view of an individual case. Yet the independent counsel is cut off from the accumulated lore and wisdom of career Department of Justice officers, who are in a unique position to evaluate "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Wayte*, 470 U.S. at 607. These factors will often counsel against prosecution; a case that seems strong and important when viewed in isolation may look weak or trivial when measured against past cases or in relation to broader considerations of sound deployment of prosecutorial resources.[52]

An independent counsel is not required to follow Department of Justice policies, and so, on her own and unsupervised, decides matters as sensitive as what level of confidence in the prosecutor's mind regarding the target's guilt is sufficient before an indictment may properly be sought. Lawrence Walsh, the independent counsel in the Iran/Contra investigation, for example, has suggested that if he finds probable cause to believe that a crime has been committed, he has a duty to prosecute.[53]

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[52] It is of course possible that a given defendant might claim that he would be tactically advantaged if prosecuted by an independent counsel rather than by the Justice Department. That eventuality merely emphasizes the Act's uneven application of the law and it surely does not undermine appellants' claim.

[53] L. Walsh, Remarks at the Prayer Breakfast of the American Bar Association (August 9, 1987) (Exhibit No. 10 to Brief of Appellants).

Probable cause is that low standard of confidence thought sufficient to support the issuance of a search warrant or an arrest warrant. The standard governing United States Attorneys' prosecutorial determinations, on the other hand, is much higher—it is the policy of the Department of Justice that as a matter of "fundamental fairness" an indictment should not be sought unless the prosecutor believes that an *unbiased* jury would convict, a standard which provides far greater protection than probable cause against the possibility that the target of an investigation will be unnecessarily subjected to a lengthy and expensive ordeal. U.S. Attorneys' Manual § 9-27.220 (June 15, 1984). Perhaps a less stringent standard may be justified in particular circumstances, but it is inconsistent with the doctrine of a unitary executive that under the independent counsel statute the target of an investigation may be exposed to less protection than if investigated by a United States Attorney, while the President and the Attorney General or for that matter any other politically accountable officials are powerless to affect the independent counsel's choice of the standard for prosecution.[54] The President "may properly supervise and guide [his officers'] construction of the statutes under which they act in order to secure that unitary and *uniform* execution of the laws which Article II of the Constitution evidently contemplated in vesting

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[54] As we have held, the Attorney General independently granted Mr. Walsh authority to conduct the Iran-Contra investigation and, therefore, presumably retained the power, by modifying the regulation, to control such matters. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, No. 87-869 (Jan. 19, 1988). We refer to Mr. Walsh's "probable cause" standard because it affirms our view of the incentives and disincentives that affect an independent counsel. In the present case there can be no question that the Attorney General lacks authority to influence the independent counsel's prosecutorial determination.

general executive power in the President alone." *Myers*, 272 U.S. at 135 (emphasis added).[55]

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We therefore conclude that the Act viewed as a whole, taking into account its appointment, removal, and supervisory provisions, so deeply invades the President's executive prerogatives and responsibilities and so jeopardizes individual liberty as to be unconstitutional.

V.

The last basis upon which the Act is challenged is that it invests an Article III court with non-Article III powers. The constitutional principle of separation of powers may be violated in either of two ways. "One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Or, the principle is alternatively violated when one branch assumes a function that more properly is entrusted to another." *Chadha*, 462 U.S. at 963 (Powell, J., concurring in judgment) (citations omitted). By removing a core executive officer from the control of the Executive Branch, the Act, as we have concluded, interferes with the executive's "performance of its constitutionally as-

[55] The dissent claims that the Framers did not anticipate a "centralized federal prosecutorial corps," Dissent at 19 n.22, thus suggesting that they were unconcerned with the "problem of uneven application [of the law]" we refer to here. But bureaucratic form is not determinative; it matters not that the early United States Attorneys were within or without a particular department. What is important is that, from the very beginning, they were appointed by the President with the advice and consent of the Senate, and were removable by the President. *See* 1 Stat. 92 (1789). This gave the President the means to give direction to, and control, these officers, *see The Confiscation Cases*, 74 U.S. (7 Wall.) 455 (1868), and thus to achieve a "steady administration of the laws," which certainly was contemplated by the Framers. *See* THE FEDERALIST No. 70, at 471 (A. Hamilton) (J. Cooke ed. 1961).

signed function." Considered from a different viewpoint, though, the Act violates the separation of powers doctrine because it entrusts a court with an executive function, which a court may not constitutionally undertake. These defects are reciprocal in nature; the Act impermissibly takes a central responsibility from the Executive Branch in violation of Article II, and it impermissibly gives that executive responsibility to the Judicial Branch, thereby violating Article III. The latter defect would not appear if, for example, the Act placed the responsibility to supervise the independent counsel in the Speaker of the House of Representatives, although such a statute would have constitutional problems of its own. *See Bowsher*, 106 S. Ct. 3181.

Article III of the Constitution limits the judicial power of the United States to "Cases" and "Controversies." Federal courts therefore must " 'carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution.' " *Muskrat v. United States*, 219 U.S. 346, 355 (1911) (citation omitted). The "case or controversy" limit "defines the 'role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.' " *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). It also preserves an independent and neutral judiciary, relatively removed from the decisions and activities of the other two branches. Discharging tasks other than the deciding of cases and controversies would "involve the judges too intimately in the process of policy and thereby weaken confidence in the disinterestedness of their judicatory functions." F. Frankfurter, *Advisory Opinions*, in 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 475, 478 (1930); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 582 (1962) (opinion of Harlan, J.).

Granted, the appointments clause of Article II bestows upon the judiciary unquestioned authority that it might not otherwise enjoy, given the circumscribed nature of Article III, to appoint, pursuant to appropriate legislation, at least those who support judges in the exercise of their Article III functions—clerks, secretaries, magistrates, and the like. It seems obvious to us, however, that this clause cannot be construed so as to undermine or nullify Article III limitations.

The Special Court under the Act not only appoints the independent counsel, it defines the jurisdiction of the independent counsel, it receives reports from the independent counsel, and it is authorized to terminate the office of the independent counsel "on its own motion . . . on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel . . . have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." 28 U.S.C. § 596(b)(2). Since these provisions necessarily involve the Special Court in the non-Article III task of supervising the day-to-day activities of an Executive Branch official we hold them unconstitutional.

In *Hobson v. Hansen*, 265 F. Supp. 902 (1967), a special three judge federal district court considered a constitutional challenge to a law providing that members of the District of Columbia school board be appointed by United States district court judges sitting in the District of Columbia. Although its decision upholding the law, as we have noted, rested on a more narrow ground, the court did proceed to discuss the appointments clause of Article II, finding in it an additional grant of authority to courts to make appointments. The court, however, carefully distinguished power to appoint an executive officer from power to undertake other administrative duties relating to that officer's performance: "Were the

judges authorized to administer the schools, even though our District Court is an Article I as well as an Article III court, there would have been 'such incongruity in the duty required as to excuse the courts from its performance or to render their acts void.'" *Id.* at 913 n.14 (quoting *Ex parte Siebold*, 100 U.S. at 398). The distinction found in *Hobson v. Hansen* between the power to appoint and the power to administer is an obvious one.[56] Appointment is a one time only task, and does not require the appointing body to supervise or otherwise become entangled in the activities of the appointed official. So, even if under the authority of the appointments clause of Article II a court may constitutionally appoint an executive officer, when an Article III court is called upon to supervise and administer the executive office, constitutional bounds are transgressed. *See Buckley*, 424 U.S. at 123; *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

Under the Act, once the Attorney General applies to the Special Court for appointment of an independent counsel, the Special Court must "appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 593(b). During the investigation the independent counsel may on her own motion apply to the Special Court "to refer matters related to the independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 594(e). Accordingly, "[t]he court's responsibility in defining the prosecutorial jurisdiction of an existing special prosecutor is a continuing one." S. REP. No. 170, 95th Cong., 2d Sess. 65 (1977). As we noted, during the investigation in the case at bar, the independent counsel petitioned the Special Court for referral of additional matters. *See In re Olson*, 818 F.2d

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[56] We fail to see the relevance, as a matter of constitutional law, of the distinction our dissenting colleague offers between administration and supervision. Dissent at 6 n.5.

34 (D.C. Cir. Indep. Couns. Div. 1987). In its answer to that petition, the Special Court "interpreted" the independent counsel's original grant of jurisdiction to allow the independent counsel to investigate whether Olson had conspired with Schmults or Dinkins despite the fact that the Justice Department had previously found no reasonable ground to investigate this charge. *Id.* at 47-48. Guidance regarding the scope of an executive official's duty undeniably is a typical supervisory function; in this case the court's guidance was actually opposed to that which the Executive Branch gave.

While the Attorney General has, as a matter of practice, included as part of the application for the appointment of the independent counsel a statement of suggested jurisdiction, the Act does not mandate that he do so; it requires only that the Attorney General provide "sufficient information to assist the division of the court to select an independent counsel and to define that independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 592(d)(1). Nor has the Special Court treated the Attorney General's statement of suggested jurisdiction as binding, and neither the statute nor the legislative history of the Act suggests that it should.[57] In another independent counsel investigation that has been before this court, the Iran/Contra investigation, *see In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987) (per curiam), the Special Court defined the independent counsel's jurisdiction to include more events and persons than those included in the Attorney General's application. *See In re Oliver L. North*, No. 86-6 (D.C. Cir. Indep. Couns. Div. Order filed Dec. 19, 1986). That decision had obvious political and foreign policy overtones. The Special Court's action followed receipt of a letter from the Democratic members of the Senate Judiciary Committee requesting that the jurisdiction of the independent counsel be expanded to include an investigation into the provision of support for forces fighting the government of Nicaragua. *See In re Sealed Case*, 829 F.2d 50, 65 n.3 (D.C. Cir. 1987) (Williams, J., concurring and dissenting). The Special Court's determination to grant this jurisdiction to the independent counsel (albeit subsequently ratified by the Attorney General) was not made in the context of a case or controversy; no public hearing or notice to the parties involved preceded the decision. Even if the parties had been before the court, the presence of adversaries with a personal stake in the matter does not, contrary to the dissent's suggestion, Dissent at 38, convert a policy dispute into an Article III case or controversy. *Keller v. Potomac Elec. Co.*, 261 U.S. 428 (1923). Like many other executive decisions, the determination of jurisdiction in both the *North* and *Olson* proceedings was made in the context of swirling controversy in which various factions hoped for opposing outcomes and the decisions necessarily rested on indeterminate considerations of policy and on information brought to the decisionmaker's attention through various avenues, including *ex parte* communications.

Definition of a prosecutor's jurisdiction is, of course, crucial to the whole enterprise of executing the criminal law, for in practical terms, it determines who may be subject to prosecution and for what crimes.[58] Deciding

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[57] The Senate Report on the Act states that "even if the Attorney General should not request that related matters be assigned to an existing special prosecutor, the court has the authority to do so . . . ." S. REP. No. 170, 95th Cong., 2d Sess. 65 (1977).

[58] We reject the argument of the independent counsel that the power to define her jurisdiction is a "necessary incident" of the power to appoint. Her argument would allow Congress to abrogate Article III case or controversy limitations by the simple expedient of vesting appointment power in the courts. Even under the independent counsel's broad conception of the court's power to make appointments, it does not follow that

to target certain people and certain acts, and to exclude others, necessarily involves a balancing of factors and a setting of priorities that have uniformly been held to be beyond the province of the judiciary. *See, e.g., Wayte*, 470 U.S. at 607; *Heckler v. Chaney*, 470 U.S. at 831; *Newman v. United States*, 382 F.2d 479, 480-81 (D.C. Cir. 1967). These decisions may not generally even be reviewed by a court, *id.* at 480-82, and yet the Act requires the Special Court to make them in the first instance. Where there is no law to apply and where a decision necessarily involves a paradigmatic political choice to allocate societal resources one way rather than another, a court must inevitably act "under compulsions and motives that have no relation to performance of our Art. III functions." *Vermont v. New York*, 417 U.S. 270, 277 (1974) (per curiam).

That is not all. When independent counsel have become concerned about whether the federal conflict-of-interest laws apply to them, they have approached a member of the Special Court in his chambers and sought his advice on this issue.[89] In response, the Special Court has issued "orders" that purport to exempt the independent counsel and the staff of the independent counsel

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they may perform other, more extensive executive tasks. *See Hobson*, 265 F. Supp. at 913 n.14.

Nor does the "necessary and proper" clause, as the independent counsel and the Special Court itself, *see In re Olson*, 818 F.2d at 44, assert, authorize Congress to assign non-judicial duties to courts in contravention of Article III. *See Buckley*, 424 U.S. at 135.

[89] *See Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 6-7 (1987) (prepared statement of Hon. George E. MacKinnon, Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit) (legislative history unavailable prior to release of this opinion; statement referred to in Brief of Amicus Curiae Michael K. Deaver).

from conflict-of-interest laws.[90] And in another case, the Special Court ordered an independent counsel to delay an investigation of certain allegations until completion of related state criminal proceedings. H.R. CONF. REP. No. 452, 100th Cong., 1st Sess. at 26 (1987). Again, it is important to note that such orders were not given in the context of a case or controversy; no notice was given to interested parties and no hearing was held or briefs filed. It seems more than a bit artificial to place the issuance of such orders into the category of accepted judicial duties. For all effects and purposes these were instructions given by a superior to an executive officer under his supervision, a task which Article III does not contemplate as judicial.

Finally, we turn to the Special Court's "removal" power. In *Bowsher v. Synar*, the Supreme Court struck down a law that vested executive power in an officer who was removable by a joint resolution of Congress. Discussing the relationship between the power to remove and the power to control, the Court said:

> To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws . . . . "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."

106 S. Ct. at 3188 (quoting *Synar v. United States*, 626 F. Supp. at 1401). Potential for control is not, as we saw in *Bowsher*, contingent on removal power that is direct and unlimited. Congress' power to remove the Comptroller General, from which the Supreme Court inferred congres-

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[90] *See In re Michael K. Deaver*, No. 86-2 (D.C. Cir. Indep. Couns. Div. Order filed July 2, 1986); *In re Theodore B. Olson*, No. 86-1 (D.C. Cir. Indep. Couns. Div. Order filed June 18, 1986).

sional control over that officer, was a good deal more circumscribed than the Special Court's power to remove the independent counsel. In *Bowsher*, congressional removal authority was restricted by a for cause provision, the check of bicameralism, and the possibility of an executive veto. In addition, there was a sixty year tradition of the Comptroller General's independence; no Comptroller General had ever been removed by Congress. Nevertheless, the Court found that this relatively constrained—perhaps more theoretical than real—removal power created too great a danger of congressional interference with executive functions to withstand a separation of powers challenge.

Here the Special Court (consisting not of 100 Senators and 455 House members but only three judges) may in effect abolish the office of the independent counsel whenever two of the judges believe her investigation no longer serves a useful purpose. 28 U.S.C. § 596(b)(2). Authority to terminate, perhaps abruptly, the entire office, to disavow all the independent counsel's efforts and halt ongoing proceedings appears to us, if anything, to be greater power than the right merely to remove one independent counsel. On the other hand, should the Special Court wish in effect to discharge what it believes is a "runaway" independent counsel and yet ensure that ongoing investigations or prosecutions continue, it has authority under the Act to turn the work of the independent counsel back to the Justice Department by finding that her efforts are "substantially completed." *Id.* This Special Court then holds over the head of the independent counsel both the broadsword and the rapier to control the pace and depth of the independent counsel's activities.

As all who have borne the responsibility of criminal investigation well know, there is no such thing as a perfect investigation. More leads can always be pursued, more facts can always be discovered, more witnesses can always be interviewed; therefore, a wise determination

that an investigation should end is a subtle one often requiring as much self-confidence and courage as close legal analysis. That responsibility, like the initiation of an investigation through appointment of the independent counsel and the definition of its scope (jurisdiction), is the very essence of prosecutorial discretion. These powers and responsibilities are here all combined in the Special Court, whose exercise of them is, moreover, unreviewable.[61] In *Bowsher*, the President at least retained the appointment power and some check, through the veto power, on removal. And, it will be recalled, removal of the Comptroller General was arguably subject to judicial review. *See Bowsher*, 106 S. Ct. at 3190.

The independent counsel's contention that all these duties are not dissimilar to the responsibilities of an Article III court when it is obliged to find probable cause before issuing a search warrant or when it rules on matters concerning grand juries is wholly unpersuasive. The Bill of Rights refers to both search warrants and grand juries, and since the earliest days of the Republic it has been assumed that judges may play a role in each. *See generally Brown v. United States*, 359 U.S. 41, 49-52 (1959). Indeed, since the grand jury referred to in the Fifth Amendment is the grand jury as it existed at common law, and since that grand jury was traditionally overseen by a judge, it is fair to conclude that the Constitution implicitly requires that judges assume the role they do in a grand jury proceeding. That includes summoning witnesses to attend and give testimony, as well as using the court's contempt power to punish recalcitrant witnesses. *Id.* But even if this were not so, the

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[61] The Ethics in Government Act does not provide for review of a decision by the Special Court to terminate the office of the independent counsel, although it does provide for judicial review if the Attorney General removes the independent counsel. The clear implication, it seems to us, is that Congress did not intend the Special Court's removal decision to be subject to review.

authority that the Special Court exercises over the independent counsel, particularly with respect to the scope of the independent counsel's investigation, is far greater than and qualitatively different from the role of a federal judge vis-a-vis a grand jury. The judiciary is, under the Act, implicated directly in Executive Branch policy judgments—a judge cannot insist that a grand jury investigate a particular person or incident, yet under the independent counsel statute the Special Court has just that power over the independent counsel.[82]

Similar arguments are made in the amicus brief from the United States House of Representatives, which asserts that since a prosecutor is an officer of the court who works in and about the courts and who is subject to court rulings and instructions there can be no impropriety in the Special Court's appointment and supervision of the independent counsel. This argument has previously been squarely rejected by this court. In *Newman v. United States*, 382 F.2d 479, 481 (D.C. Cir. 1967) (emphasis added), then-Judge Burger said of the United States Attorney:

> He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner of his conduct of a case, *i.e.*, his demeanor, deportment and ethical conduct; but in his second capacity, as agent

[82] We have already indicated that *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987), cannot be extended, as the independent counsel argues, to authorize a court to appoint and supervise a federal prosecution. *Vuitton* was limited to appointment of a private attorney *required* to prosecute violations of judicial orders—this was regarded a judicial, as opposed to an executive, function. No party suggests that the Act's delegation to the Special Court of appointment and supervision of the independent counsel is a delegation of a judicial (Article III) function. Instead, it is defended on the authority of the appointments clause found in Article II.

> and attorney for the Executive, *he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty . . . .*

Intimate involvement of an Article III court in the supervision and control of a prosecutorial office undermines the status of the judiciary as a neutral forum for the resolution of disputes between citizens and their government. From the inception of this nation the crucial importance of a neutral judiciary has been repeatedly emphasized. Madison wrote, concerning the dangers of mixing the judicial function with other governmental roles, "'[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.'" THE FEDERALIST No. 47, at 326 (J. Madison) (J. Cooke ed. 1961) (emphasis in original) (quoting Montesquieu). Of the three branches, it is the role of the judiciary that the Constitution most clearly and tightly confines within narrow borders. Describing these constitutional limits, Madison said "the executive power being restrained within a narrower compass, and being more simple in its nature; *and the judiciary being described by landmarks, still less uncertain*, projects of usurpation by either of these departments, would immediately betray and defeat themselves." THE FEDERALIST No. 48, at 334 (J. Madison) (J. Cooke ed. 1961) (emphasis added). This careful delineation of the Judicial Branch's appropriate role serves both to guard against the danger of judicial tyranny feared by Madison and to preserve the courts as a neutral forum for the resolution of disputes. "Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination." *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 90 (1947).

The Act's inattention to Article III's limitations is particularly troubling because it implicates the course of a federal criminal investigation, which, if there were an indictment, must necessarily come before the federal courts for trial and, in all likelihood, appeal. In any such trial or appeal, the defendant may wish to call the court's attention to misconduct by the independent counsel or by the independent counsel's superior, who, as we have shown, in practical terms is the Special Court. This can raise an obvious dilemma for a defendant who may be impelled to engage in subtle calculations concerning the possibility of offending the court by pointing too vigorously to alleged overreaching by fellow judges or by an officer appointed by and supervised by fellow judges. In this very appeal, appellants seem to have considered the possible influence of this court's respect for its colleagues in framing their arguments.[22] Appellants have delicately suggested—and we think rightly—that the Special Court's opinion in *In re Olson* was not only incorrect, but improper. Even though no party before it challenged the constitutionality of the Act, the Special Court purported to decide that issue, and did so in a proceeding in which the parties who actually were challenging the statute's constitutionality were not heard. To be sure, the Special Court's "denial" of the independent counsel's request for amended jurisdiction could

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[22] As one appellant's counsel said,

> [w]e are here today talking about errors that were made not by such Executive Branch official, we say, not by the legislature, we say, but we are here to complain in part about errors which we say were made by members of this court, and there is some discomfort in that, to argue that to you, and I would suggest that that discomfort is constitutionally based. And from my perspective, from the perspective of the accused, it is a kind of betrayal of the concept of an absolutely neutral judiciary who I can come to, who is not married to the prosecutor or who has no relationship to them.

Tr. of Oral Argument at 130.

properly rest on its desire to avoid constitutional problems (although issuing a "judicial opinion" to that effect seems dubious), but it was certainly gratuitous for the court to express its advisory view of the Act's constitutionality. The Ethics Act, after all, precludes judges on the Special Court from sitting on cases brought by independent counsel. 28 U.S.C. § 49(f). And yet the Special Court's opinion would seem designed to influence the outcome of those cases where targets of independent counsel were directly challenging the constitutionality of the Ethics in Government Act. Not surprisingly, its opinion was relied upon by the district court in this case. So we can well understand counsel's diffidence in challenging the activities of the Special Court. " 'The need to preserve judicial integrity is more than just a matter of judges satisfying themselves that the environment in which they work is sufficiently free of interference to enable them to administer the law honorably and efficiently. Litigants and our citizenry in general must also be satisfied.' " *In re Application of President's Comm'n on Organized Crime*, 763 F.2d 1191, 1197-98 (11th Cir. 1985) (quoting *Hobson v. Hansen*, 265 F. Supp. at 931 (Wright, J., dissenting)). The Act, then, is constitutionally defective not only because it gives courts powers beyond what Article III allows, but also because the powers given conflict with those that the Constitution entrusts in us.

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At the very core of this constitutional dispute lies the dual meaning of the word "politics." The Act's independent counsel provisions are designed in significant part to remove the influence of partisan politics from those prosecutorial decisions perceived as most vulnerable to partisan considerations. No one as a matter of principle can disagree with this general objective, whether as applied to those covered by the Act or, for that matter, as applied to all Americans subject to criminal and civil law. Politics however, as we and the Supreme Court

have emphasized, also refers to quite legitimate governmental policy determinations—in this case Executive Branch policy determinations. Unfortunately, it is impossible through the device Congress chose to excise the former without encroaching upon the latter.

Mindful as we are of the distinguished array of legal talent and institutional authority asserting the constitutionality of the Ethics in Government Act, we come only soberly and not easily to our conclusion that the Act is unconstitutional. We have grappled with issues that we full well recognize divide the nation politically (using the word in the partisan sense), and federal judges—properly removed from any political considerations, partisan or policy—do not relish the task of deciding such issues. But great constitutional cases have often arisen out of the crucible of partisan struggle, *e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and we have no alternative but to apply our view of the Constitution. This is no abstract dispute concerning the doctrine of separation of powers. The rights of individuals are at stake.

GINSBURG, RUTH B., *Circuit Judge, dissenting*: The core of the constitutional issues presented in these consolidated cases is whether the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-98 (1982 & Supp. III) (Ethics Act or Act) violate the doctrine of separated government powers. There is an irony in the majority's holding that the Act is constitutionally infirm, for the measure strives to maintain the structural design that is the genius of our Constitution—the system of mutual checks and balances; the Act's sole purpose is to curb or avert abuses of executive branch power. Because I conclude that the Ethics Act neither impermissibly transfers an executive function to another branch nor orders an undue displacement of executive prerogatives, I would hold that the legislation withstands appellants' separation of powers challenges.

Appellants advance two less encompassing constitutional claims: that the Act contravenes the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, and that it also violates the case or controversy requirement of Article III. These challenges are intertwined with the overarching separation of powers question; I find neither claim persuasive, whether considered separately or in conjunction with the larger challenge.

Finally, appellant Olson advances a statutory claim: that the Special Division incorrectly defined independent counsel's jurisdiction to include possible conspiracy charges against Olson in the absence of a specific request to that effect by the Attorney General. For the reasons set forth in part IV., I conclude that Olson's statutory claim is not ripe for this court's review.

Accordingly, I would hold the Ethics Act constitutional and affirm the judgments of the district court.

I.

Appellants' separation of powers contentions build from the characterization of prosecution as an executive function; they advance three variants of the charge that the Act encroaches on this executive domain. One group of arguments clusters around the concept of aggrandizing one branch at the expense of another. A second avenue of challenge focuses on limitation; displacement of the constitutionally-assigned functions of one branch may undermine the structure of separated and balanced powers even absent an impermissible transfer or sharing of functions. Finally, appellants argue that the Act places impermissible constraints on the President's power to remove independent counsel. For the reasons stated below, none of these separation of powers challenges should succeed.

A.

Appellants allege that the Act grants both the legislative and judicial branches impermissible roles in the conduct of prosecutions. They assert that the Act allows Congress to exert undue influence on law enforcement decisionmaking. Appellants also argue that the Act effectively transfers supervision of the prosecutorial function to the Special Division. Neither contention withstands scrutiny.

In *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), the Supreme Court set forth the separation of powers analysis applicable to the question whether one branch has intruded impermissibly on the domain of another. The Court held that it is a violation of the "doctrine of separation of powers," *id.* at 3184, for Congress to charge the Comptroller General with the performance of executive functions, and at the same time to retain for itself the power to remove him. The Court reasoned that the constitutional precept of divided and separated powers "does not contemplate an active role for Congress

in the supervision of officers charged with the execution of the laws it enacts." *Id.* at 3187. Thus the *Bowsher* analysis proceeds in two steps. One first must characterize a given activity as legislative, executive, or judicial in nature. The inquiry then progresses to the question whether a different branch exercises supervision of, or control over, the identified function. *Bowsher* suggests that any such transfer of authority would be a violation of the separation principle.

The first step of the *Bowsher* analysis is unproblematic in this case. No participant in the litigation questions that prosecution is properly typed an executive branch function.[1] *See, e.g., United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965). The second *Bowsher* question, whether the Act cedes control over prosecution to Congress or to the judiciary, requires more extended consideration.

Section 595(e) allows members of the Committee on the Judiciary of either House of Congress to request that the Attorney General apply for the appointment of an independent counsel.[2] The same section requires the At-

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[1] It is not necessarily a "core" executive function. *See infra* pp. 20-21.

[2] 28 U.S.C. § 595(e) reads:

> A majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of [an] independent counsel. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to

torney General to respond to such a request, either by notifying the committee that he has made the requested application, or by stating why he decided not to apply. Appellants argue that this provision results in improper congressional influence on the process of prosecutorial decisionmaking. The objection is insubstantial.

Section 595(e) contains no language suggestive of an intent to give Congress the power to compel the Attorney General to apply for appointment of an independent counsel. The sole apparent purpose of the provision is accountability.[3] The Attorney General has discretion to decide whether to seek appointment of an independent counsel; if the decision is in the negative, he is not required to explain that decision in any detail.[4] This lim-

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which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

[3] A similar role is performed by the requirement of § 596 (a)(2) that the Attorney General submit to the Special Division and to Congress a report regarding any decision to remove an independent counsel. The removal decision is subject to judicial review, *see infra* p. 11; unlike the decision whether to seek appointment of independent counsel, removal does not involve an exercise of prosecutorial discretion. *See also infra* note 29.

[4] If the reason for not appointing a special prosecutor is the fact that the matter is so unsubstantiated as to not warrant further investigation or prosecution, the Attorney General's explanation under this subsection need only

ited duty to give a reason for his decision is no more intrusive of executive branch prerogatives than the investigation challenged and upheld in *McGrain v. Daugherty*, 273 U.S. 135 (1927). There the Supreme Court, though not addressing the separation of powers question directly, upheld a Senate select committee's subpoena directing the brother of a former Attorney General to testify before it. The subject of the committee investigation was

> the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited.

Id. at 177. It must be inferred that in the Court's view prosecutorial decisions were not to be kept in splendid isolation from congressional oversight.

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state that fact. The Committee does not intend that the Attorney General go into any detail with regard to the basis for the decision made in the exercise of his prosecutorial discretion that a matter simply did not warrant any further investigation or prosecution after the conclusion of a preliminary investigation.

S. REP. No. 170, 95th Cong., 1st Sess. 72 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4288. I note here the clear understanding of Congress that under the Act as originally conceived and as renewed, the Attorney General's decision whether to request appointment of an independent counsel is not subject to judicial review. *See* Independent Counsel Reauthorization Act of 1987, H.R. CONF. REP. No. 452, 100th Cong., 1st Sess. 22 (1987) (except for Attorney General's decision to remove an independent counsel, "an Attorney General's determinations under the independent counsel law are not subject to judicial review").

Turning from legislative oversight to third branch participation, appellants contend that the several duties assigned to the Special Division under the Act render it, in effect, independent counsel's supervisor. In fact, the court's role is more administrative than supervisory.[5]

The Special Division cannot initiate an investigation or prosecution. § 593(b). Upon application of the Attorney General it performs two functions in the appointment process: the court selects an individual to fill the position of independent counsel; and it defines that individual's jurisdiction, guided by the terms of the Attorney General's application. *Id.*

The Special Division has no supervisory role during independent counsel's tenure.[6] Should the Attorney General elect to remove an independent counsel pursuant to § 596(a)(1), the Special Division was formerly the forum in which independent counsel might seek review, § 596(a)(3),[7] and the Division retains authority to fill vacancies on the resignation, death, or removal of an independent counsel. § 593(e).

[5] I use the term "administrative" to refer to duties which include interpretation of the Act and the original grant of jurisdiction, but which do not involve the Special Division in the day-to-day supervision of independent counsel's investigative and prosecutorial activities.

[6] The Division does have the duty to decide whether to refer "matters related to the independent counsel's prosecutorial jurisdiction" when such a request is made by independent counsel. *See* 28 U.S.C. § 594(e). This function may require clarification of the original jurisdictional grant, *cf.* In re Olson, 818 F.2d 34, 47-48 (D.C. Cir. Indep. Couns. Div. 1987), but it does not involve examining the manner in which independent counsel conducts an investigation or prosecution within the limits of her jurisdiction, as a supervisor would do. Expansion of independent counsel's jurisdiction requires a request by the Attorney General. § 593(c).

[7] Under the Independent Counsel Reauthorization Act of 1987, the forum for judicial review of the removal of an independent counsel is the United States District Court for the District of Columbia and no member of the Special Division may participate in the review proceedings. 28 U.S.C. § 596(a)(3) (as amended Dec. 15, 1987). The change is effective immediately. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 6(b)(2)(F), 101 Stat. —— (1987).

Upon completion of an investigation and/or prosecution, independent counsel must file a comprehensive report with the court. § 595(b)(1), (2). The Special Division also has the power to terminate an office of independent counsel on its own motion or at the suggestion of the Attorney General, on a finding that the assigned investigation is complete or substantially complete. § 596(b)(2). Each of the areas in which the Special Division exercises some degree of discretion presents an avenue of challenge for appellants.

The court's responsibility for selection of an individual to fill the independent counsel role does not, by itself, constitute an intrusion into the prosecutorial function. Courts frequently choose individuals to fill vacancies in the corps of U.S. Attorneys, pursuant to 28 U.S.C. § 546.[8] Such appointments have been upheld against constitutional challenge. *United States v. Solomon*, 216 F.Supp. 835 (S.D.N.Y. 1963). Under § 546, of course, the executive branch is free to replace the interim U.S. Attorney at any time. *Id.* at 842-43. Under the Ethics Act the court's choice is final, but it is a choice made only upon the request of the executive branch, and no court may review the Attorney General's decision not to request appointment of an independent counsel. *See supra* note 4.

[8] 28 U.S.C. § 546 reads:

> The district court for a district in which the office of United States attorney is vacant may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

The Act does not on its face require that the court's definition of independent counsel's jurisdiction track the Attorney General's application.[9] It cannot, however, be read to grant the Special Division unfettered discretion in this regard. Such a reading would be inconsistent with the preconditions of the court's jurisdiction-defining role: that the Attorney General conduct a preliminary investigation, § 592(a)(1), and that he provide "sufficient information to assist the division . . . to define [an] independent counsel's prosecutorial jurisdiction." § 592(d)(1). It was expected that the Attorney General would provide relatively specific information:

> The prosecutorial jurisdiction can only be properly defined if the Attorney General provides complete and detailed information to the court about the true nature of the allegations of criminal wrongdoing, any related criminal investigation which are [sic] presently being conducted by the Department, and any information or leads collected as a result of the preliminary investigation which would indicate the potential that further investigation will involve additional related matters.

S. REP. No. 170, 95th Cong., 1st Sess. 56 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4272. Congress gave the Special Division no anchor for its jurisdictional delineations other than the Attorney General's findings and recommendations; one cannot reasonably ascribe to the legislature a will to allow the Special Division to stride past the markers of the only investigation it has at hand. Since courts must interpret statutes in such a way as to give effect to all of their provisions, *see Weinberger v. Hynson, Westcott & Dun-*

[9] 28 U.S.C. § 592(d)(1) provides:

> Any application under this chapter shall contain sufficient information to assist the division of the court to select [an] independent counsel and to define that independent counsel's prosecutorial jurisdiction.

ning, 412 U.S. 609, 633 (1973),[10] the Act must be read to require the court's jurisdictional specification to be substantially as requested by the Attorney General.[11] The essential decision whether to proceed in a given direction toward potential prosecution, then, rests with the Attorney General, not the Special Division.

The termination provisions likewise present no problem of impermissible intrusion. The report submitted under § 595(b), upon independent counsel's termination of an investigation, generates no supervisory response from the court.[12] To the extent that *any* reporting re-

[10] I note too the cardinal principle that courts construe statutes, whenever fairly possible, to avoid any constitutional conflict. *See, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490, 500-01 (1979).

[11] *Accord* In re Olson, 818 F.2d 34 (D.C. Cir. Indep. Couns. Div. 1987) (holding that Attorney General's decision not to refer certain matters to independent counsel precludes Special Division from making the same referral).

[12] 28 U.S.C. § 595(b) reads:

> (1) In addition to any reports made under subsection (a) of this section, and before the termination of [an] independent counsel's office under section 596(b) of this title, such independent counsel shall submit to the division of the court a report under this subsection.
>
> (2) A report under this subsection shall set forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted.
>
> (3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report

quirement might create a degree of subservience on the part of the reporting officer, that effect is minimized here by the prior definition of independent counsel's jurisdiction. Any prosecutorial activity within the jurisdictional confines ultimately traceable to the Attorney General is insulated from the Division's scrutiny. Any decision by the Division to terminate an office of independent counsel, whether on its own motion or at the suggestion of the Attorney General, is similarly constrained by the jurisdictional grant.[13]

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under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

[13] *See* § 596(b)(2):

> The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the independent counsel shall file the report required by section 595(b) of this title.

The majority finds a similarity between the Special Division's power to terminate an office of independent counsel on its own motion and the removal provision at issue in *Bowsher*. Maj. Op. at 81-83. However, the legislative history of the Act makes it clear that the termination provision was intended to serve only as a measure of last resort, one to arrest a "runaway" independent counsel:

> This paragraph provides for the unlikely situation where a special prosecutor may try to remain as special prosecutor after his responsibilities under this chapter are completed. . . . The drastic remedy of terminating the office of special prosecutor without the consent of the special prosecutor should obviously be exercised with caution.

S. REP. No. 170, 95th Cong., 1st Sess. 75 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4291.

Time and statutory clarification have overtaken a further argument appellants put forward. They read former § 596(a)(3) as establishing a "judicial veto" over the Attorney General's decision to remove an independent counsel for cause because the section said the Special Division could order relief if the removal "was based on error of law or fact." *See* Brief of Appellants, Nos. 87-5261, 87-5265 (Appellants' Br. II) at 38-39.[14] This appellants took to mean that the Special Division was empowered to engage in de novo review, thus construing the congressional product to provoke, not avoid, a constitutional controversy. *Cf. supra* note 10. But Congress has clarified that it never intended application of any extraordinary or intense judicial review standard:

> The conference agreement also deletes the sentence which establishes the ["error of law or fact"] standard for courts to apply in reviewing the removal of an independent counsel from office. This standard was included when the statute was originally enacted as a reflection of existing law regarding officials subject to removal only for good cause. However, the conferees want to avoid any possibility that it would be viewed as having established a different standard. The intent of the statute as originally enacted, and as reauthorized, is that the courts should apply the standards established by existing case law on the removal of such officials.

Independent Counsel Reauthorization Act of 1987, H.R. CONF. REP. No. 452, 100th Cong., 1st Sess. 37 (1987).[15]

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[14] I recognize that appellants' deeper objection is to the imposition of *any* limitations on the President's power to remove independent counsel. That issue is addressed *infra* at I.C.

[15] I note, moreover, that even if it were arguable that the Act, prior to the 1987 reauthorization, empowered the Divi-

To summarize, taken as a whole, the Special Division's role is more administrative than supervisory. The Division's discretion is constrained at every juncture by the original grant of jurisdiction, itself defined in response to the Attorney General's application for independent counsel. The Division holds no control rein over the exercise of the independent counsel's prosecutorial discretion. Thus, there is no *transfer* of the prosecutorial function to the judicial branch of government.[18]

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sion to review a removal de novo, appellants here would have encountered a ripeness shoal. To claim that the prospect of de novo Division review of a removal would affect independent counsel's judgments "here-and-now," *see* Bowsher v. Synar, 106 S. Ct. 3181, 3189 n.5 (1986), one would have to posit that independent counsel would have proceeded to engage in an investigative or prosecutorial activity that she would have resisted had she contemplated merely deferential judicial review of an Attorney General's future determination to remove her for cause. This is surely speculation run rampant, all the more so given that the review standard in question was unclear on its face and had not been authoritatively construed. *Cf.* In re Sealed Case, 829 F.2d 50, 61 (D.C. Cir. 1987) ("[A]ny harm to [appellant]that is a sufficiently direct and immediate consequence of the Ethics Act must involve an investigative or prosecutorial activity that [independent counsel] would not undertake if he depended for his authority *solely* upon the Attorney General's regulation.") (emphasis in original), *cert. denied*, No. 87-869 (Jan. 19, 1988).

[18] Nor is there any transfer of authority to Congress. In addition to § 595(e), discussed *supra* pp. 3-5, § 595(a) requires independent counsel to report to Congress "from time to time," and § 595(d) provides for congressional oversight. Neither provision affords the legislature an opportunity for "substantial involvement . . . in the enforcement of federal criminal law," as appellants suggest. Brief of Appellant, No. 87-5264 (Appellant's Br. I) at 23. The reporting provision, § 595(a), provides that the "statements and reports shall contain such information as such independent counsel deems appropriate." This requirement to report what independent counsel deems fitting cannot intrude intolerably on independent counsel's autonomy. The oversight provision,

This is not to deny that the Act imposes limits on the executive. It calls upon the Attorney General to apply for independent counsel if his preliminary investigation, § 592(a)(1), of a possible violation of federal criminal law by a covered individual reveals "reasonable grounds to believe that further investigation or prosecution is warranted." § 592(c)(1). Matters turned over to independent counsel pursuant to the Act[17] might well be handled by the Department of Justice in the absence of the Act; to that extent offices of independent counsel represent a displacement of the executive's prosecutorial role. But the executive functions are performed by an officer independent of the other two branches as well as the executive; the appropriate separation of powers analysis, therefore, is indicated not in *Bowsher*, but in *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986).[18]

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§ 595(d), is surely less intrusive than the investigation approved in McGrain v. Daugherty, 273 U.S. 135 (1927), discussed *supra* p. 5. *Compare, e.g.*, 50 U.S.C. § 413(a), which requires the Director of Central Intelligence to report to Congress regarding intelligence activities.

[17] The Attorney General has the authority to determine whether information initially received is "sufficient to constitute grounds to investigate," § 592(a)(1), and following a preliminary investigation, whether "further investigation or prosecution is warranted." § 592(c)(1). The operation of the Act is mandatory only in the sense that when the Attorney General determines that investigation or prosecution of a covered individual is warranted, he cannot pursue the matter within the Department of Justice but must apply for appointment of an independent counsel.

[18] Moreover, it is appropriate to recall a crucial qualification Madison featured in discussing the requirement "that the three great departments of power should be separate and distinct." Referring to the "oracle" on this subject, "the celebrated Montesquieu," Madison wrote:

> [Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the

B.

Appellants charge that, even absent a transfer of functions, independent counsel's independent exercise of prosecutorial responsibilities itself constitutes an unconstitutional inroad into executive branch territory. Such an incursion, they argue, impairs the executive's ability to fulfill the obligation to "take Care that the Laws be faithfully executed," which in turn threatens the constitutionally-created balance among the three branches of the federal government.[19]

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example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted. This would have been the case in the constitution examined by him, if the King who is the sole executive magistrate, had possessed also the compleat legislative power, or the supreme administration of justice; or if the entire legislative body, had possessed the supreme judiciary, or the supreme executive authority.

THE FEDERALIST No. 47, at 325-26 (J. Madison) (J. Cooke ed. 1961) (emphasis in original).

[19] The majority places great weight on the concept of a "unitary executive." *See* Maj. Op. at 27-28. In my colleagues' view, encroachment on the unity of the executive—the singleness of the Presidency—is synonymous with encroachment on the executive's power "to take Care that the Laws be faithfully executed." Their approach suggests that it is a per se constitutional violation to place any check upon absolute executive branch control of prosecution.

However, it is far from evident that the duty to "take Care" was intended to establish unbridled authority in the President and his men. More plausibly, the words were meant to import a limitation:

> Indeed, the Framers probably included the "faithful execution" clause in the Constitution to limit, not expand, the President's power. The clause was intended to rule out any power for him to dispense with, or suspend, the execution of the laws. Thus, the President may not always have the power to direct the execution of the laws, but merely a duty to do so when the laws have not excluded his direction.

Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. REV. 59, 90 (1983) (footnotes omitted). *See also id.* at 90 nn.151, 152; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 253 (2d ed. 1988); Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFFAIRS 284, 310 (1987/88) (clause obliges President to "take care that the laws [of Congress] be faithfully executed").

The majority slides down a steep slippery slope of its own making in suggesting that my position abides any and all intrusions on the enforcement functions of the executive. *See* Maj Op. at 52, 62. The correct constitutional issue, I believe, is the effect of an intrusion into one branch's assigned functions on the overall balance of powers. *See infra* note 20; *supra* note 18.

In *Commodity Futures Trading Comm'n v. Schor*, *supra*, announced the same day as *Bowsher*, the Supreme Court articulated a separation of powers analysis applicable where there is encroachment on—or siphoning off from—one branch but no transfer of function to another. The *Schor* approach, I believe, cannot be written off as good for one day and case alone. In *Schor* the Court considered a statutory scheme which allowed the Commodity Futures Trading Commission (CFTC) to adjudicate garden variety state common law counterclaims interposed in reparation proceedings. That arrangement, the Court held, did not impermissibly diminish the domain of Article III courts. In so ruling, the Court distinguished the *Bowsher* analysis:

> Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch.

106 S. Ct. at 3261.

The Court's discrete separation of powers analyses in *Bowsher* and *Schor* should guide our way in this case. Where one branch appropriates the functions of another the separation of powers issue arises most pointedly. In these cases a straightforward, "formalistic" analysis is indeed the order of the day. *See also Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983). But a measure such as the one before us presents a more subtle problem. The danger of creating an imbalance among the three branches by taking some business away from one of them is in all cases a vital concern, but the actual effects of each apparent limitation should be examined with care. A more fluid, functional approach is appropriate if we are to preserve the full range of structural values encompassed under the heading of separation of powers.

Schor's separation of powers analysis turns on the nature and extent of the intrusion, or siphoning off, and the purpose it is designed to serve:

> Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

106 S. Ct. at 3258. In the context of removing certain matters from the executive, rather than judicial, branch,[20] *Schor*'s approach counsels a consideration of

[20] There is no reason to suppose that the *Schor* analysis applies only to the judiciary. Just as the life tenure and salary provisions guarantee the independence of Article III judges, *see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59-60 (1982), so the provision for a unitary executive was intended to enable that branch to fulfill its constitutional role. The ability of each of the three branches to perform its assigned functions well is crucial to maintaining the proper balance among them. Here, as in *Schor*, Congress has distributed a portion of the assigned responsibility of one branch to an independent agent. Thus the same value is at stake in both cases: preserving the balance of powers.

three factors: the extent of the removal, whether the limitation affects a core executive function, and the purposes of the legislation.

The Ethics Act effects only a limited incursion into executive territory. The Attorney General makes two important decisions at the outset: whether there is sufficient information to conduct a preliminary investigation and, after undertaking such an investigation, whether there are reasonable grounds to believe further investigation or prosecution warranted. § 592(a)(1), (c)(1). These decisions are not subject to judicial review. *See supra* note 4. The Attorney General alone has the power to remove an independent counsel, albeit he must have cause to do so. § 596(a)(1).[21] Most signifi-

It might be argued that intrusion on the executive branch presents a greater threat than intrusion on the judiciary, because of the danger that the remaining political branch—the legislature—might occupy the area vacated by the executive. "Power abhors a vacuum. Unhitching the Independent Counsel from the executive may make the office naturally prone to domination by the branch that represents its primary competitor." In re Sealed Case, 829 F.2d 50, 65 n.3 (1987) (Williams, J., concurring and dissenting). But here Congress has interposed the judiciary as administrator of the independent counsel provisions, thus securing independence from legislative as well as executive interference.

[21] In deciding that removal of a special prosecutor should only be for the causes described above, and should only be accomplished by the personal action of the Attorney General, the Committee was attempting to balance the need for independence for a special prosecutor with the desire, for constitutional and other reasons, that the division of the court not be engaged in supervision of the special prosecutor. In order to exercise the removal power, a certain degree of supervision is required and the Committee felt it appropriate that this supervision be

cantly, the Attorney General's application for independent counsel sets boundaries for the assignment given to independent counsel. In short, the Attorney General exercises very significant authority at the crucial junctures in the process of establishing an office of independent counsel.

In this regard the present case is more like *Schor* than *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which a large delegation of judicial powers to bankruptcy judges was held to violate Article III and the separation of powers principle. *Id.* at 58. Under the scheme challenged in *Northern Pipeline*, the bankruptcy courts were given jurisdiction over "all civil proceedings arising under title 11 [the bankruptcy title] or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (1976 & Supp. IV). The grant of power also included the ability

> to hold jury trials, [28 U.S.C.] § 1480; to issue declaratory judgments, § 2201; to issue writs of habeas corpus under certain circumstances, § 2256; to issue all writs necessary in aid of the bankruptcy court's expanded jurisdiction, § 451 (1976 ed. and Supp. IV); see 28 U.S.C. § 1651; and to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11, 11 U.S.C. § 105(a) (1976 ed., Supp. IV).

458 U.S. at 55. Bankruptcy courts thus were given the full authority of Article III courts with respect to any proceeding "related to" a Title 11 claim.

The scheme validated in *Schor*, on the other hand, vested less encompassing authority in the Commission to hear claims that would otherwise be heard in the first instance in court, and the powers of the Commission are more limited than were those of the bankruptcy courts.

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conducted by the Attorney General, who is a member of the executive branch of the government.

S. REP. NO. 170, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4289.

"[T]he CFTC, unlike the bankruptcy courts under the 1978 Act, does not exercise 'all ordinary powers of district courts,' and thus may not, for instance, preside over jury trials or issue writs of habeas corpus." *Schor*, 106 S. Ct. at 3259.

Under the Ethics Act the independent counsel's assignment is channeled: she is able to pursue only matters falling within the jurisdictional grant; she may not take on, in addition, new matters merely because they are "related to" the assignment she has been given. *See In re Olson*, 818 F.2d 34 (D.C. Cir. Indep. Couns. Div. 1987). In this respect, her office cannot be compared with the sprawling commission of the bankruptcy courts examined in *Northern Pipeline*. On the other hand, independent counsel does enjoy, for the particular matter she has been empowered to investigate, virtually "the full authority of the Attorney General." Appellants' Br. II at 14-17. Balancing the two factors—a circumscribed mission, but a full arsenal to accomplish that mission—and taking into account the Attorney General's role in applying, or choosing not to apply, for appointment of independent counsel, I conclude that the Ethics Act effects no intolerably sweeping displacement of executive branch authority.[22]

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[22] Appellants advance two additional arguments: that assigning some prosecutorial duties to officers outside the executive branch may result in uneven and unfair application of the laws, and that the absence of executive branch control may permit some activity contrary to U.S. foreign policy. Appellant's Br. I at 25-26. There is no allegation that any conflict with foreign policy has been identified in the present case, and there is no reason to suppose that problems that might arise cannot be handled by district court control on a case-by-case basis. Two points can be made in regard to the charge of uneven application. The framers certainly did not have in their immediate view a centralized federal prosecutorial corps; nominally supervised by the Secretary of State, federal district attorneys were largely independent actors during the Federalist period. L. WHITE, THE FEDERAL-

Appellants contend that the Act tampers with a "core" executive function—prosecution.[23] Though it is indisputably an executive task, *see United States v. Nixon*, 418 U.S. at 693, it is not obvious that prosecution is at the "core" of the executive branch's constitutionally-assigned functions, in the sense that the job must be kept, in any and all cases, under the President's wing and cover.

Core executive functions are described in Article II; they include, notably, the President's role as Commander in Chief of the Armed Forces, and his power to make treaties and to grant pardons. *See* U.S. CONST. art. II, § 2. While the executive's powers, unlike those of the legislature, are not limited to those enumerated in the Constitution's text, *see Myers v. United States*, 272 U.S. 52, 118 (1926) ("The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . . ."), it seems fair to assume that the powers specifically mentioned were of central concern to the framers. Prosecution was decentralized during the federalist period, *see* L. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 408 (1948), and it was conducted by district attorneys who were private practitioners employed by the United States on a fee-for-services basis. *Id.* at 406-08. I cannot conclude that the framers, or the Con-

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ISTS: A STUDY IN ADMINISTRATIVE HISTORY 406-08 (1948). Second, the Act is designed precisely to prevent uneven application of a different sort: improperly lax investigation and prosecution of high government officials. If unequal treatment is a danger with the Ethics Act, it is also a danger—one of grave concern to Congress—without the Act. *See also infra* note 26.

[23] Appellants advance this characterization in the context of their argument that the President's power to remove independent counsel should be unrestricted, but it is apposite to the present analysis as well. Appellant's Br. I at 31-33.

gress that enacted the Judiciary Act of 1789, would have considered prosecution a function that must remain, *sans* exception, with the President and his men.[24]

Though in pertinent respects analogous to the measure challenged in *Schor*, the Ethics in Government Act serves a significantly different legislative goal. The purpose of the Commodity Exchange Act relevant in the *Schor* case was to "create an inexpensive and expeditious alternative forum," 106 S. Ct. at 3260, an objective Congress embraced without adverting to structural considerations. Thus the Court was obliged to evaluate the extent of the conflict between the congressional objective—making available for adjudication of a common law counterclaim a forum more convenient, cheaper, and swifter than an Article III court—and separation of powers principles. In contrast, the Ethics Act is intended to implement those principles.

The framers constructed a government of separated powers with the purpose of "diffus[ing] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). "The accumulation of all powers legislative, executive and judiciary in the same hands [is] the very definition of tyranny." THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961). The chosen structure, however, was decidedly not one of absolute separation. *See United States v. Nixon*, 418 U.S. at 707; *Nixon v. Administrator of GSA*, 433 U.S. 425, 442-43 (1977); *see also supra* note 18. The allocation of legislative, executive, and judicial functions among the three branches was accompanied by a system of checks and balances, so that no branch could use isolation as an in-

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[24] *See infra* note 41; *see also* Henkin, *supra* note 19, 66 FOREIGN AFFAIRS at 286, 290 (framers lacked "comprehensive, coherent conception of [President's] office").

strument of domination. Implementation of the principle of separated powers must look to both features of the constitutional scheme.[25]

The Ethics Act is designed to function as a control against abuse of executive branch power. It implements the checking aspect of the separated powers. The independent counsel provisions of the Act were developed in response to the Watergate era abuses of executive branch powers, abuses which themselves threatened the balance between the three branches of government. The Act is rooted in the principle that "no man can be a prosecutor or judge in his own case." S. REP. No. 170, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4221.[26] It is similarly unreasonable to expect an individual to investigate or prosecute his superiors:

> The pressures, the divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is essential.

Id. (testimony of Archibald Cox, Watergate Special Prosecutor, before the 94th Congress). The Act thus operates as a means of maintaining the executive's proper—and

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[25] As Madison cautioned, because men among the governors as well as the governed are not angels, the departments of government should be divided and arranged so that "each may be a check on the other." THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

[26] That the king or his special courts not judge the king's own men and allow them to escape the ordinary processes of justice was of concern to eighteenth century political thinkers. *See, e.g.*, A. DE TOQUEVILLE, THE OLD REGIME AND THE REVOLUTION 73, 77-78 (J. Bonner trans. 1856).

properly circumscribed—constitutional role.[27] The Act's purpose must be given the maximum possible positive weight.[28]

The *Schor* Court validated an encroachment on judicial branch authority. It characterized the incursion as "limited," 106 S. Ct. at 3260, albeit trenching on a core function—the adjudication in the first and only trial instance of traditional state common law contract claims. "The counterclaim asserted in this case is a 'private' right for which state law provides the rule of decision. It is therefore a claim of the kind assumed to be at the 'core' of matters normally reserved to Article III courts." *Id.* at 3259. The Court found the incursion justified by virtue of "the congressional purpose behind the jurisdictional delegation"—creating "an inexpensive and expeditious alternative forum"— and "the demonstrated need for the delegation." *Id.* at 3260. Here we have an incursion on the executive domain which, if it is qualitatively more substantial, is also more blended and connected with the department affected, witness the large initiating and removal role of the Attorney General. *See supra* pp. 7-12. Furthermore, it is not as clearly a disturbance of a "core" function, *see supra* pp. 20-21; and it is intended to serve not merely "legislative convenience," *see Schor*, 106 S. Ct. at 3264 (Brennan,

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[27] The unity of the executive branch was intended to serve the ends of responsibility and accountability. *See* Brief of Amicus Curiae United States (DOJ Br.) at 8 (citing THE FEDERALIST No. 70, at 476-77 (A. Hamilton) (J. Cooke ed. 1961)). The Ethics Act is in this light complementary; it too promotes the responsibility and accountability of the executive.

[28] This discussion of Congress' purpose in enacting the Ethics Act is not meant to endorse independent counsel's argument that the Act is constitutionally justified simply because it is needed. *Cf.* Brief of Appellee, Nos. 87-5261, 87-5264, 87-5265 (Appellee's Br. I) at 25-28. The present point is only that Congress' purpose comports with the essential design of checks and balances.

J., dissenting), but to vindicate the precise structural principle against which it must be measured. I conclude that the Ethics Act generates no unconstitutional displacement of an executive function.

C.

Section 596(a)(1) permits removal of independent counsel "only by the personal action of the Attorney General," and only for "good cause" or a physical, mental, or other condition that "substantially impairs the performance" of her duties.[29] Appellants contend that restrictions on the President's[30] power of removal encroach on the exclusively executive domain of prosecu-

[29] The House conference report on the 1987 reauthorization of the Act clarifies Congress' intent that "good cause" not be construed to include failure to follow Presidential policy. Explaining their decision not to include a proposed statement to that effect, the conferees state:

> While the conferees remain extremely concerned about recent erroneous statements by the Department of Justice that an independent counsel may be fired for failing to obey any Presidential order—even an order which would compromise the very integrity of an independent counsel's proceedings—the conferees are confident that any court reviewing the removal of such an independent counsel would reject the Department's reasoning.

Independent Counsel Reauthorization Act of 1987, H.R. CONF. REP. No. 452, 100th Cong., 1st Sess. 37 (1987).

[30] The President has the power to remove U.S. Attorneys at will, 28 U.S.C. § 541(c), but it is the Attorney General who has the parallel power to remove Assistant U.S. Attorneys. 28 U.S.C. § 542(b). The difference is not significant, since the Attorney General "is the hand of the President in taking care that the laws of the United States . . . be faithfully executed." Ponzi v. Fessenden, 258 U.S. 254, 262 (1922). Had the Act granted the Attorney General (but not the President) an unrestricted power to remove independent counsel, it is doubtful that any limitation-on-removal challenge would remain.

torial discretion. The executive's ability to fulfill the constitutional command faithfully to execute the laws, they argue, requires unrestricted authority to remove officers charged with executive duties.

The Supreme Court has provided some guidance on the question of congressionally-imposed limits on the removal of executive officers. In *Myers v. United States*, 272 U.S. 52 (1926), the Court held unconstitutional a statute which required Senate advice and consent to the President's removal of a postmaster first class, reasoning that "the power of removal of executive officers by the President alone was essential in the division of powers between the executive and the legislative branch." *Id.* at 167. *Myers'* sweeping language was narrowed by *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld a statutory limitation on the President's power to remove Federal Trade Commissioners.[31] The Court found no separation of powers violation because, it said, the commissioners perform "quasi-legislative or quasi-judicial" duties, and "must be free from executive control." *Id.* at 628.

The Court focused on the latter factor in *Weiner v. United States*, 357 U.S. 349 (1958). It held that War Claims Commissioners, who were appointed for fixed terms, were not subject to removal at the President's pleasure, even though Congress had been silent on the question of removal. The Court read the crucial distinction to be that between officers "who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference," *id.* at 353; removal powers as to the latter could be restricted. Finally, the Court recently invalidated a statute grant-

[31] The Federal Trade Commission Act provided: "Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." FTCA, ch. 311, 38 Stat. 717 (1914) (codified at 15 U.S.C. § 41 (1973)).

ing Congress an active role in the removal of the Comptroller General, an officer found to be performing executive functions. *Bowsher v. Synar, supra.*

The holdings of these four cases point to one crucial distinction, between congressional participation in the removal process and congressionally-imposed limits on a power of removal which remains in the executive branch.[32] Congressional participation in removal, not an issue in this case, uniformly has been disapproved. *Myers, supra*: *Bowsher, supra.* The more difficult question concerns how to define the class of officers whose removal may be subject to restrictions.[33] *Humphrey's Executor* and *Weiner* may be read two ways. Appellants contend that neither case involved officers performing "purely executive" functions; such officers must serve at the President's will. Appellee counters that it was the need for freedom from executive interference that was decisive in those two cases.

Appellants' reading—that Congress *never* may restrict the executive's power to remove "purely executive" officers—places too much weight on the characterization of an officer's function. Like the Comptroller General, FTC Commissioners are charged with responsibility for interpreting and applying acts of Congress, yet implementation of legislative policy was characterized as "quasi-legislative" in *Humphrey's Executor*, 295 U.S. at 628, "executive" in *Bowsher*, 106 S. Ct. at 3192. The constitutionality of statutory restrictions on the removal

[32] This distinction accords with that between a transfer of authority and the lesser step of a limited incursion on, or siphoning off from, another branch's domain. *See supra* pp. 12-15.

[33] No party or amicus contends that Congress may restrict the President's power to remove *any* executive officer. "[T]here are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President." *Bowsher*, 106 S. Ct. at 3207 (White, J., dissenting).

power cannot depend on such a problematic question of characterization.[34]

Humphrey's Executor and *Weiner*, therefore, should be read as appellee proposes: the cases validate restrictions on the removal of certain executive officers whose functions require freedom from executive branch supervision. Since Congress' power to create independent offices performing executive tasks is itself subject to separation of powers review and analysis, *see supra* I.B., the "freedom from interference" test also incorporates that review and analysis. A congressional determination that a given task requires independence cannot by itself be sufficient to confer constitutional validity; that approach would cede the separation of powers question to Congress. The "freedom from interference" test must be understood to mean that when Congress has created an office otherwise consistent with separation of powers principles, and

[34] Justice White made this point in his *Bowsher* dissent:

> Although the Court in *Humphrey's Executor* characterized the powers of the Federal Trade Commissioner whose tenure was at issue as "quasi-legislative" and "quasi-judicial," it is clear that the FTC's power to enforce and give content to the Federal Trade Commission Act's proscription of "unfair" acts and practices and methods of competition is in fact "executive" in the same sense as is the Comptroller's authority under Gramm-Rudman—that is, it involves the implementation, (or the interpretation and application) of an act of Congress. Thus, although the Court in *Humphrey's Executor* found the use of the labels "quasi-legislative" and "quasi-judicial" helpful in "distinguishing" its then-recent decision in *Myers v. United States*, [citation], these terms are hardly of any use in limiting the holding of the case; as Justice Jackson pointed out, "[t]he mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-488 (Jackson, J., dissenting).

Bowsher, 106 S. Ct. at 3207 n.3 (White, J., dissenting).

which requires independence from "Executive establishment" control—both judicially reviewable matters—Congress may implement the latter purpose by imposing restrictions on the executive's power to remove an individual occupying that office.

There can be no doubt that limiting the President's power to remove independent counsel is essential to the instant legislative scheme. An unrestricted removal power would create a "here and now subservience" that would thwart the goal of independence. Thus the removal restrictions of § 596(a)(1) are permissible under *Humphrey's Executor* and *Weiner*, given that the independence of independent counsel—the mandate to conduct investigations and prosecutions without day-to-day executive branch supervision—itself satisfies the requirements of the separation of powers doctrine. It therefore follows from the result reached in I.B., *supra*, that the removal provision should withstand judicial scrutiny as well.

II.

Appellants advance two challenges to the Act under the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2.[35] Because independent counsel is not an "inferior Officer," they argue, the constitutional requirement is that she be appointed by the President with the advice and consent of the Senate. Appellants also contend, in the alternative, that even if independent counsel is an inferior officer in the constitutional sense, her appointment may not be vested in a court.

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[35] [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

Appellants argue that the class of officers who must be appointed by the President, on advice and consent of the Senate, cannot be limited to those specifically mentioned in Article II, § 2. They maintain that officers who exercise significant authority and discretion, Appellants' Br. II at 21, fit within that category. Appellants concede, however, that neither the Appointments Clause itself nor contemporaneous commentary speaks plainly to the classification question. "In the practical course of government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the Constitution, whose appointment does not necessarily require the concurrence of the Senate." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1536 (5th ed. 1891).[36] Appellants thus urge this court to make a substantive determination: whether independent counsel enjoys sufficient responsibility and independence to be held an officer whose appointment must be made in the manner of an ambassador, or a Supreme Court Justice.

The majority has responded to appellants' plea and has reached out to supply a definition of an inferior officer: one who is *subordinate* to a principal officer. Maj.

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[36] *But cf.* United States v. Germaine, 99 U.S. 508, 509-10 (1878):

> The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments.

It is not necessary for the resolution of this case to decide whether heads of departments should be counted among the officers "specially mentioned."

Op. at 17. The majority does not, however, identify the authority for this interpretation. That is not surprising. The only recorded exchange over the prescription "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments" is this:

> Mr. Madison. It does not go far enough if it be necessary at all—Superior Officers below Heads of Department ought in some cases to have the appointment of the lesser offices.
>
> Mr Govr Morris There is no necessity. Blank commissions can be sent—

2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627 (September 15) (M. Farrand ed. 1911). Madison thus suggested that the clause on which this case first turns for my colleagues was of no great moment in the framers' debate, and indeed is not self-defining. Significantly, Madison called "Superior" an officer my colleagues would no doubt dub "inferior"—someone below a department head and thus *subordinate*.

What can one make of the various appellations to which the framers made reference—"inferior," "Superior," "lesser," "principal"? Only this, I believe. One cannot place too much stock in "original intent" as it applies to the appointment of nonjudicial officers other than those specifically enumerated in the Appointments Clause. And surely one cannot rest one's decision in a grand constitutional controversy on contemporary definitions of terms the founding fathers failed to pin down.

Appellee points out that this court recently validated the Attorney General's appointment, within the Department of Justice, of an independent counsel charged with exactly the duties and responsibilities enjoyed by independent counsel under the Act. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, No. 87-869 (Jan.

19, 1988). Independent counsel therefore must be an inferior officer, she argues, because the Attorney General may not constitutionally appoint any other kind of officer. The majority counters that the Attorney General's power to rescind the regulation pursuant to which a Justice Department "independent" counsel is appointed renders such officers subordinate and hence inferior. Maj. Op. at 17-19. The majority's response begs the question. Were the nature and scope of an officer's duties—rather than the majority's "subordinate" construct—the determining factor, independent counsel would have to be counted an inferior officer, for the reason appellee advances.

Appellee also emphasizes *Ex Parte Siebold*, 100 U.S. 371 (1880), in which the Supreme Court upheld a statute assigning courts the responsibility for appointing certain election commissioners, who therefore must be inferior officers. These commissioners had no superiors. The ground on which the majority distinguishes *Siebold* is not entirely clear. The opinion first suggests that the election commissioners' responsibilities were more limited than those of independent counsel, Maj. Op. at 20, but goes on to hint that it is in some way significant that the commissioners, unlike independent counsel, "were not clearly within any of the three branches." *Id.*

In short, the majority cannot sustain its own argument that subordinacy alone determines whether an officer is inferior or non-inferior in the constitutional sense.[57] The status of independent counsel—clearly not equivalent to a department head in the nature and scope of her duties, but also not subject to day-to-day supervision by a hier-

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[57] Appellants themselves reject the argument advanced by the Department of Justice, *see* DOJ Br. at 13-14, and adopted by the majority, Maj. Op. at 17, that subordinacy alone determines inferior status. Appellants' Reply Br. II at 2 n.3. Even heads of departments, they note, have a superior: the President. *See also* Appellee's Br. I at 38 n.38.

archic superior—defies facile classification.[28] Because the founding fathers did not settle the question, I regard the matter as one on which Congress' judgment is owed a large measure of respect—deference of the kind courts accord to myriad constitutional judgments Congress makes, for example, most judgments about what classifications are compatible with the command that all persons shall enjoy "the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Congress has the authority to create both categories of offices—those the President must fill with the Senate's concurrence and "inferior" ones. Thus the present question is not one of pure or abstract categorization; rather, it concerns the legitimacy of a classification made by Congress pursuant to its constitutionally-assigned role in vesting appointment authority. That constitutional assignment to Congress counsels judicial deference. The

[28] The district court held independent counsel an inferior officer, relying in part on the fact that "he [sic] is appointed for a single task to serve for a temporary limited period." July 20, 1987 D.D.C. Memorandum at 3 (quoting In re Olson, 818 F.2d at 44), and on United States v. Eaton, 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official."). The majority, on the other hand, suggests that independent counsel's responsibilities are comparable to those of a department head: "[I]t could well be argued that independent counsel, who often supervise more employees than cabinet departments once employed, are themselves 'heads of departments[.]'" Maj. Op. at 23. Whatever the merit of this anachronistic argument, it is the law of this circuit that the Attorney General may appoint an independent counsel with the exact duties granted under the Act, constrained only by the practically remote possibility that the regulation could be revoked and the appointment thereby terminated. In re Sealed Case, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, No. 87-869 (Jan. 19, 1988). The nature and scope of the duties of such an appointee, our precedent thus affirms, fit those of an inferior officer.

chosen mode of appointment here indicates that Congress meant to create an inferior office. That intention alone is not dispositive of the constitutional issue, for it is common ground that Congress does not have the "final say." *See* Maj. Op. at 23 n.20. But judicial review must fit the occasion. Where, as in the matter at hand, the label that better fits an officer is fairly debatable, the fully rational congressional determination surely merits more tolerance than my colleagues accord it. The arguments advanced by appellants and by the majority, that independent counsel ought to be considered an officer similar in stature to heads of departments, in sum, are insufficiently compelling to justify upsetting Congress' considered judgment on the matter. I conclude that independent counsel is an inferior officer within the meaning of the Appointments Clause.

Appellants contend that even if independent counsel is an inferior officer, she cannot constitutionally be appointed by a court. The exceptions clause, all participants in this case agree, admits of more than one interpretation. Appellants argue that the clause must be read to permit the vesting of the power to appoint inferior officers only within the branch, or the department, in which they are to serve. Appellee argues that there is no express constitutional limitation; Congress may vest the appointment of any inferior officer in the President, the courts, or department heads.

In *Ex Parte Siebold*, *supra*, the Supreme Court adopted an interpretation of the exceptions clause similar to that advanced by independent counsel.[29] The Court

[29] It is quite clear that the *Siebold* court was interpreting the Appointments Clause and not, as the majority opinion suggests, merely asking whether the act in question imposed "duties not judicial" on the circuit court. *See* Maj. Op. at 36. It is also clear that *Siebold* distinguished *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The authority to appoint

said, "[b]ut as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress." *Id.* at 397-98. The Court also suggested, however, that inter-branch appointments might be subject to an implied requirement of "congruity": "[T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void." *Id.* at 398.

An inter-branch appointment would indeed fail the test of congruity if it violated the separation of powers doctrine. The majority argues that assigning to one branch the appointment of an officer whose duties are central to the role of a different branch would violate the separation of powers and thus would be incongruous. Maj. Op. at 38.[40] I am in accord with my colleagues as to the principle, but do not agree with their application of it in this concrete case. Vesting the appointment of independent counsel in the Special Division is not incongruous because, as set forth at I.A. and I.B., *supra*, the Ethics Act neither unduly displaces executive branch prerogatives, nor transfers supervision of the prosecutorial function to the judiciary.[41]

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inferior officers was found in the Appointments Clause; *Hayburn's Case* had considered an Article III challenge. *Id.* at 398.

[40] The majority reads *Siebold* not to implicate the separation of powers issue. Maj. Op. at 37. I disagree: the election commissioners had enforcement responsibilities, and even if the character of their duties is not entirely certain, *see* 100 U.S. at 397, the separation of powers inquiry remains apt, under the incursion, albeit no transfer, heading. *See supra* pp. 12-15.

[41] At least some members of the First Congress shared the view that judicial appointment of federal prosecutors was

Appointment of independent counsel by a court meets the test of statutory congruity as well. It would be incongruous in the extreme, given the purposes of the Act, to vest appointment of independent counsel in the Presi-

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constitutionally permissible. The first Judiciary Act as reported by the Senate Judiciary Committee provided:

> [E]ach District Court shall appoint a meet Person learned in the Law to act as Attorney for the United States in such District, and shall swear him to the faithful Execution of his Office, whose duty it shall be to [prosecute] in such District all Delinquents for Crimes & Offences, cognizable under the authority of the United States and all [ci]vil Actions [in which the United States shall be concerned] . . . And he shall receive as a compensation for his services such Fees as shall be taxed therefor in the respective Courts before which the Suits or Prosecutions shall be—And the Supreme Court shall also appoint a meet person learned in the Law to act as Attorney General for the United States . . . whose duty it shall be to prosecute and conduct all Suits in such Court in which the United States shall be concerned, and to give [his] advice and opinion upon Questions of Law when required by the President of the United States, or when requested by the Heads of any of the Departments[.]

DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, 5 LEGISLATIVE HISTORIES 1193-94 (1986) (Senate Bill 1 as reported to the Senate by committee member Senator Richard Henry Lee of Virginia, June 12, 1789).

The majority's argument that the change to Presidential appointment "may have been motivated by constitutional concerns," Maj. Op. at 35, is entirely speculative. The letter from Robert Livingston quoted by the majority was cited by the House of Representatives' Brief in support of the proposition that the decision regarding the appointment of prosecutors was one of "discretionary choice," not constitutional compulsion. Brief of Amicus Curiae House of Representatives at 28. The House emphasizes what Livingston thought would be "better." My colleagues place the emphasis elsewhere. No winner can be declared in debate of this order. In matters so shrouded in doubt, resort to lines later penned by framers "is often not fruitful," surely never "determinative." *See* Henkin, *supra* note 19, 66 FOREIGN AFFAIRS at 286, 290, 307.

dent, and the same would be true of heads of departments, themselves serving at the President's pleasure. The Ethics Act was designed in part to serve as an assurance that high executive officials would not receive especially favorable treatment under the law.[42] That purpose would be undercut by a strictly intra-branch appointment process. The appearance and reality of impartiality is well served by locating the appointment of independent counsel in the least political, least partisan branch of government. I conclude that the Appointments Clause permits vesting the appointment of independent counsel, an inferior officer in the constitutional sense, in a "court of law." [43]

III.

The Ethics in Government Act violates Article III of the Constitution, appellants contend, by assigning courts responsibilities not encompassed within the "case or controversy" requirement of Article III, § 2. This argument is, in a sense, the obverse of that considered in I.A., *supra*. Any transfer of functions from one branch to another creates two potential violations: the diminution of the duties assigned one branch, and the allocation of inappropriate responsibilities to the other.[44] Although it was established in I.A., *supra*, that there is no impermissible transfer of prosecutorial decisionmaking to the Special Division under the Act, a further Article III claim remains. Appellants maintain that *any* assignment of nonjudicial tasks violates Article III; it was acknowledged in I.A. that the Special Division performs some

[42] *See supra* note 26.

[43] Even absent the responsibility for reviewing removal of an independent counsel, *see supra* note 7, the Special Division clearly is a court of law. *See infra* pp. 37-39.

[44] *Compare* the majority opinion at 74-87, maintaining that the court serves as independent counsel's day-to-day supervisor. That argument is presented under an Article III rubric; it could equally be styled a separation of powers claim.

administrative tasks under the Act, short of a supervisory role.

Appellee argues, in my view correctly, that the Appointments Clause authorizes the selection of independent counsel by a court. *See supra* pp. 33-36. Article III cannot be read to exclude the possibility of lodging in a court any appointment responsibility outside the third branch, for that would render the Appointments Clause prescription superfluous. Appellee further asserts that the power to define independent counsel's jurisdiction is incidental to the appointment power, and so is similarly authorized by Article II, § 2, cl. 2.

Appellants maintain that the power to define independent counsel's jurisdiction "compels the Division to make substantive law enforcement decisions." Appellants' Br. II at 40. In fact, the Special Division merely assigns independent counsel an area of responsibility, closely tailored, as noted *supra* pp. 8-9, to the Attorney General's application. It would be impossible for the Division to appoint independent counsel without in some manner defining—and restricting—the scope of her authority.[45] When an appointment is made to a preexisting office, the title of the office may be all that is needed to define the duties of the new appointee. But where a statute provides for ad hoc appointments, such that the office itself must be defined at the time of appointment, the power to define is a necessary incident of the power to appoint.[46]

Appellants also contend that the Special Division's resolution of independent counsel's application for re-

[45] *Compare* 28 U.S.C. § 515(a), which requires that a special U.S. Attorney be "specifically directed" before "conduct-[ing] any kind of legal proceeding."

[46] Advising independent counsel of her conflict of interest status similarly is an integral part of the process of defining her office and responsibilities. *See* D.C. Cir. Indep. Couns. Div. Order, No. 86-1, filed June 18, 1986 (under seal).

ferral of certain allegations against appellants Dinkins and Schmults constitutes a supervisory function violative of Article III. However, the Division's handling of independent counsel's application is entirely consistent with the "case or controversy" requirement. The Department of Justice filed a Response opposing the application, and independent counsel replied to the Department's Response. *In re Olson*, 818 F.2d 34, 35 (D.C. Cir. Indep. Couns. Div. 1987). Thus the application was reviewed in a contested proceeding, with opposing views presented by parties possessing "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Division provided a full and reasoned explanation of its decision. *See In re Olson*, *supra*. There seems little basis for the charge that the Division fell short of Article III requirements.

The essence of appellants' complaint, and of the majority's response to it, is that the Special Division's authority to resolve such questions as an application for expanded jurisdiction renders it independent counsel's de facto supervisor.[47] That charge is more properly understood as a separation of powers claim, and was addressed as such *supra* at I.A. Nothing in the Act, however, prevents the Special Division from handling those jurisdictional issues assigned to it in a manner consistent with Article III, as it has done in the present case.[48] I conclude that each administrative task assigned

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[47] The majority's argument that the Special Division exercises supervisory powers over independent counsel, Maj. Op. at 74-87, I note, is less than fully consistent with my colleagues' earlier position that independent counsel is a principal or non-inferior officer because she has no superior. Maj. Op. at 10-23.

[48] There is no reason to suppose that the Special Division will not continue to resolve statutorily-assigned questions as they may arise—*e.g.*, termination under § 596(b)(2)—in the context of adversarial proceedings.

the Special Division under the Act is either an incident of the power to appoint, or one that has been performed in the context of an adversarial proceeding. There is no violation of Article III.

IV.

Appellant Olson advances a statutory claim: that the Special Division could not, consistently with the Act, define independent counsel's jurisdiction to include investigation of possible conspiracy charges against Olson.

Independent counsel Morrison applied to the Special Division for jurisdiction to investigate allegations against two additional Department of Justice officials, urging in part that "the known facts raise a reasonable suspicion that Olson, Schmults, and Dinkins may have acted together . . . ." Reply to Department of Justice Response to Independent Counsel's Application for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e), at 11 (filed March 9, 1987). The Special Division denied independent counsel's request regarding Schmults and Dinkins, reading the Act to mean that the Attorney General's prior decision not to refer allegations against those two individuals precluded any such referral by the court. *In re Olson*, 818 F.2d at 47. The court did, however, interpret its original grant of jurisdiction as to Olson to include possible conspiracy charges. *Id.* at 47-48. Olson argues that this interpretation is precluded by the reasoning the court applied to the Schmults and Dinkins allegations: since the Attorney General had not specifically referred the conspiracy charges, the court could not do so.

I find Olson's claim premature. In *Deaver v. Seymour*, No. 87-5056 (D.C. Cir. June 15, 1987), this court held unripe a preindictment challenge to the constitutionality of the Ethics Act, citing the policy against preindictment challenges to "defects in the institution of the prosecution." *Id.* at 9. In *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, No. 87-869 (Jan. 19,

1988), we held unripe Oliver North's similar constitutional claim, given the valid parallel appointment of independent counsel by the Attorney General, because "any harm to North that is a sufficiently direct and immediate consequence of the Ethics Act must involve an investigative or prosecutorial activity that Walsh would not undertake if he depended for his authority *solely* upon the Attorney General's regulation." *Id.* at 61. Analogously, Olson's statutory claim can be deemed ripe only if he can show that the contempt order on appeal here, or the underlying subpoena, would not have issued but for the court's having included conspiracy allegations in its interpretation of the jurisdictional grant. No such showing—or allegation—has been made. I therefore decline to reach the merits of Olson's statutory claim.

CONCLUSION

The Ethics in Government Act is a carefully considered congressional journey into the sometimes arcane realm of the separation of powers doctrine, more particularly, into areas the framers left undefined. The Act is designed to prevent Congress' own appropriation of the functions it insulates from executive supervision, and it implements a fundamental control essential to our Constitution's doctrine of separated powers: the control of mutual checks. It is a measure faithful to the eighteenth century blueprint, yet fitting for our time. I find the Ethics Act constitutional, and would affirm the judgments of the district court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MISC. NO. 87-0197
MISC. NO. 87-0205
MISC. NO. 87-0215

IN RE SEALED CASE

FILED
JUL 20 1987

MEMORANDUM

(THIS MEMORANDUM SHALL BE FILED IN THE PUBLIC RECORD, AS IT DOES NOT REVEAL THE NATURE OR CONTENTS OF ANY SEALED MATERIAL.)

This sealed matter presents for determination by the Court the question of whether the Independent Counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. § 591 *et seq.*, comport with the Constitution of the United States. After consideration of a number of submissions concerning this issue,[1] the Court holds that the statute is constitutional.

INTRODUCTION

The historical background of and need for the Independent Counsel provisions of the Act have been fully described in other decisions and shall not be repeated here.

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[1] Among the material considered by the Court are all of the briefs filed in North v. Walsh, C.A. No. 87-0457 (D.D.C. 1987) and the appellate briefs filed in *In re Sealed Case*, No. 87-5168 (D.C. Cir. 1987).

See, e.g., In re Olson, No. 86-1, D.C. Cir. Indep. Couns. Div., April 2, 1987, at 9-14. Congress's intent in enacting the statute was clearly to create an office within the Executive Branch to investigate and prosecute matters in which the Department of Justice had a real or apparent conflict of interest. In short,

> [t]he statute is designed to ensure that violations of federal criminal law by high ranking government officials (particularly those who are of the same party as the administration in power) will be fairly and impartially investigated and prosecuted.

Id. at 9.

While it is beyond question that Congress's motive for enacting the statute was laudatory, it is also axiomatic that this motive cannot validate an otherwise unconstitutional act of the legislature. For this reason, the Court has examined in turn each provision of the Ethics in Government Act which has been alleged to be unconstitutional.

THE POWERS OF THE SPECIAL DIVISION OF THE COURT OF APPEALS

The first contention relates to the provisions of 28 U.S.C. § 49 giving authority for the appointment of Independent Counsel to a division of the United States Court of Appeals for the District of Columbia Circuit. It is strenuously contended that this grants powers to that division which exceed the limitations imposed upon federal courts by Article III of the Constitution of the United States. The specific duties alleged to be unconstitutional are set forth at 28 U.S.C. § 593(b):

> Upon consideration of an application (from the Attorney General) under section 592(c) of this title, the division of the court shall appoint an appropriate independent counsel and shall define

> that independent counsel's prosecutorial jurisdiction.

In considering whether the Special Division has been vested with unconstitutional power, it must be recognized that the source of the court's authority is not only Article III but also the Appointments Clause of Article II. Article II, Section 2, Clause 2 of the Constitution expressly grants to Congress the authority to "vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of law, or in the heads of Departments."

The issue of whether the Independent Counsel is a superior or inferior officer for purposes of the Appointments Clause has been discussed and determined by other Courts with which this Court agrees that "the Independent Counsel is clearly an 'inferior officer' — he is appointed for a single task to serve for a temporary limited period." *In re Olson* at 17. *See also Banzhaf v. Smith,* 588 F. Supp. 1498 (D.D.C.), *vacated on other grounds,* 737 F.2d 1167 (D.C. Cir. 1984). *Cf. United States v. Eaton,*169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.")[2] In addition to the limitations placed on

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[2] The limitations on the Independent Counsel are numerous. Only a small set of officials are subject to the Independent Counsel provisions. (28 U.S.C. § 591(b) includes only the President, Vice President, high officials in the White House, Department of Justice and CIA, and ranking officers of the President's National Campaign Committee). The Independent counsel has no authority outside the jurisdiction established by the Court. Pursuant to 28 U.S.C. § 596(a)(1), the independent counsel is subject to removal by the Attorney General for "good cause." The Office of the Independent Counsel terminates automatically when he or she notifies the Attorney General that the investigation is completed, 28 U.S.C. § 596(b)(1), or earlier if the Division on its own motion or that of the Attorney General determines that the investigation is substantially completed, 28 U.S.C. § 596(b)(2).

independent counsels, it is also relevant that they are not among the specifically mentioned "primary class (of officers who) require a nomination by the President and confirmation by the Senate." *United States v. Germaine*, 99 U.S. 508, 509-510 (1878). In fact, Congress indicated its own assessment that independent counsels are inferior officers when it authorized their appointment by a court of law.[3] Finally, the Attorney General, by applying for the appointment by the Court of an independent counsel, also deemed the officer to be inferior as that word is used in Article II.

Although it is clear to the Court that independent counsels are inferior officers, this does not end the analysis of the proper role of the special Division under the Appointments clause. For as the Court wrote in *Banzhaf*, 588 F. Supp. at 1504:

> This constitutional provision obviously does not authorize the Congress to charge the courts indiscriminately and without reason with the responsibility for appointing officers in the Executive departments generally.

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[3] It is also noteworthy that the Watergate Special Prosecutor was not confirmed by the Senate, although his authority was virtually identical to the authority vested in independent counsels pursuant to the Ethics in Government Act.

Once it is determined that the Independent Counsel is an inferior officer, it is clear that the attorneys on his staff are not officers at all but employees of the United States. (Again, the attorneys employed by the Watergate Special Prosecutor were not appointed under the Appointments Clause.) *See* Buckley v. Valeo, 424 U.S. 1, 126 n. 162 (1976) (citing Auffmordt v. Hedden, 137 U.S. 310, 327 (1890); United States v. Germaine, 99 U.S. 508 (1879)) ("Employees are lesser functionaries subordinate to officers of the United States")). Therefore, the fact that Associate Independent Counsel were appointed by the Independent Counsel and not the Special Court does not invalidate their appointments or the Act.

The Court in *Banzhaf* referred to the Supreme Court's decision in *Ex Parte Siebold*, 100 U.S. 371 (1880), for guidance in the determination of whether Congress appropriately vested the appointment power in the case of an independent counsel in a court of law. In *Siebold*, the Court made the following statements in the course of its decision involving a challenge to a statute vesting in the federal court the appointment of supervisors of congressional elections:

> But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress.
>
> • • •
>
> The observation in the case of Hennen, to which reference is made, (13 Pet. 258), that the appointing power in the clause referred to 'was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged,' was not intended to define the constitutional power of congress in this regard, ...
>
> • • •
>
> [T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void.

Id. at 98.

Given the previously mentioned intent of the Congress in passing the Ethics in Government Act, it was clearly not incongruous for it to utilize the authority expressly stated in the Appointments Clause to allow an impartial

court of law to select, at the application of the Attorney General,[4] an individual to investigate and potentially prosecute criminal activity within the Executive Branch. In fact, "[n]either the president, nor any head of department, could have been equally competent to the task." *Siebold*, 100 U.S. 398. Although the Special Division appoints independent counsels and defines their jurisdiction, it plays no role in their investigations and performs no acts with regard to any prosecutions that may result from these investigations. For this reason, the Act clearly does not "place incompatible duties upon (any) Court. *See Nader v. Bork*, 366 F. Supp. 104, 109 (D.D.C. 1973). Under the circumstances in which independent counsels operate, their appointment by the Judicial Branch is warranted and constitutional in the same manner as the courts' appointment of interim United States Attorneys (*See, United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963)) and attorneys to initiate criminal contempt proceedings *See, Young v. United States ex rel. Vuitton et Fils*, No. 85-1329 (U.S. May 26, 1987); *Musidor, B.V. v. Great American Screen Design, Ltd.*, 658 F.2d 60 (2d Cir. 1981); *Matter of Green*, 568 F.2d 1247 (8th Cir. 1978)). *See also* the inter-branch appointments upheld in *Rice v. Ames*, 180 U.S. 371 (1901); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967).

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[4] That the Attorney General must first apply for the appointment of an Independent Counsel before the Court may act is a vital limitation on the Court's power under § 593(b). If the Attorney General decides to apply for the appointment of an independent counsel, his decision is not reviewable by any court. 28 U.S.C. § 592(f). Similarly, if the Attorney General determines that there are no reasonable grounds to believe that further investigation or prosecution is warranted, that decision is also unreviewable. *See*, Banzhaf v. Smith, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984); *accord* Dellums v. Smith, 797 F.2d 817, 823 (9th Cir. 1986). In fact, the Court may not even extend the jurisdiction of the Independent Counsel if the Attorney General has denied such request. In re Olson, at 22-25.

The clear and precise words of the Appointments Clause validate all of these appointments.[5]

SEPARATION OF POWERS

A major theme running through the argument that the Independent Counsel provisions of the Ethics in Government Act are unconstitutional is the contention that the whole scheme represented by the Act violates separation of powers principles. This argument is advanced particularly with regard to the removal provisions of the Act, and the absence of ongoing Presidential supervision over the exercise of the Independent Counsel's discretion.

These issues are appropriately examined in a manner accepted by the Supreme Court. As the Court wrote in *Banzhaf v. Smith*, 588 F. Supp. at 1507,

> The Supreme Court has admonished the lower courts that, in matters involving the separation of powers, a pragmatic, flexible approach, must control (*citing Nixon v. Administrator of General Services*, 433 U.S. 425 at 442 (1973) and that separation of powers questions must be resolved "according to common sense and the inherent necessities of the governmental coordination" (*quoting Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*quoting Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928))).

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[5] That the Special Division also defines the jurisdiction of independent counsels does not invalidate the Ethics in Government Act. As stated above, the Court may constitutionally appoint an independent counsel under Article II because this appointment meets the incongruity test set forth by the Supreme Court. The power of the Court to define the independent counsels' jurisdiction is a necessary and proper incident of this appointment power. Independent counsels must be appointed to specific and limited tasks. To avoid the same incongruity that caused Congress to vest the appointment power in the Special Court, the Court was also given the authority to define the independent counsels' jurisdiction. The Constitution does not bar this action of the Legislature.

Removal Provision

Pursuant to 28 U.S.C. § 596(a)(1):

> A(n) independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

Although this provision of the act clearly places the authority to remove an independent counsel exclusively in the Attorney General, it is argued that the limitations placed on the Executive Branch's power of removal contravene the principle of separation of powers. This argument is advanced as well in relation to the authority of the Special Division under § 596(a)(3) which provides:

> A(n) independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief.

Supreme Court precedent suggests that in situations such as this one, where an inferior officer requires a certain degree of independence from the President for the proper execution of his assigned functions, the Congress may insulate him or her from the threat of termination at will by the Executive. First, the Supreme Court accepted even more stringent limitations than found there on the President's removal power in the case of the Watergate Special Prosecutor. *See, United States v. Nixon,* 418 U.S. 683 (1973). Additionally, both *Humphrey's Executor v. United States,* 295 U.S. 602 (1935) and *Wiener v. United States,* 357 U.S. 349 (1958) also upheld congressional authority to impose limitations on the removal power of the President. The Court, in deciding the latter two cases, looked to the nature of the function vested in the official by the Legislature to see whether independence from the Executive was a necessary characteristic of his position. The same analysis when applied here demands the conclusion that independent counsels must not be subject to removal at will by the President. For the reasons previously stated, it is beyond peradventure that "the very purpose of the office requires a degree of independence from Presidential control." *North v. Walsh, C.A. Nos. 87-457 and 87-626, slip op. at 15, n. 9 (D.D.C. Mar. 12, 1987).* The removal provision, therefore, does not violate the principle of separation of powers.[6]

The Congress's limits on the Attorney General's authority to remove an independent counsel are also valid for another reason. In *United States v. Perkins,* 116 U.S. 485 (1886), the Court upheld the power of Congress to place limitations on the Secretary of the Navy's authority to dismiss naval cadets who were inferior officers appointed by the Secretary. The Court wrote:

> We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the re-

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[6] It is significant that, although the basis of the foregoing argument is the violation of the principle of separation of powers, the Congress, in enacting the Ethics in Government Act, did not "aggrandize it self at the expense of the other two branches." Buckley v. Valeo, 424 U.S. at 129 (1976). This is an important distinction between this matter and cases such as INS v. Chadha, 462 U.S. 919 (1982) and Bowsher v. Synar, 106 S. Ct. 3181 (1986). Similarly, the Judicial Branch has no opportunity to aggrandize itself under the Act.

moval by such laws as Congress may enact in relation to officers so appointed.

Id. at 485. Here, because Congress validly vested the appointment of independent counsels in the court of law under Article II, it also validly limited the circumstances under which independent counsels may be removed.

Absence of Presidential Supervision

As has previously been noted, independent counsels operate within a limited and narrowly defined class of cases. With regard to these cases, however, they are given a large degree of independence from the Attorney General and the President.

Supreme Court precedent as well as "common sense and the inherent necessities of the governmental coordination" suggest strongly that the authority of independent counsels does not violate the separation of powers principle. In *United States v. Nixon,* 418 U.S. 683 (1973), the Court recognized and accepted that "the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure." *Id.* at 694. The Court knew that this authority included "plenary authority to control the course of investigation and litigation related to" the Watergate matter. *Id.* at 694, n. 8 (*citing* 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805).

Although the Watergate Special Prosecutor was appointed by a regulation promulgated by the Attorney General, the Court's acceptance of the constitutionality of an independent prosecutor is equally applicable here. In both cases, inferior officers were freed from daily supervision by the Executive so that they could best perform their duties and thereby satisfy congressional intent. *See also, Kendall v. United States,* 37 U.S. (12 Pet.) 524 (1837); *Humphrey's Executor,* 295 U.S. 349 (1935); *Wiener v. United States,* 357 U.S. 349 (1957). Here, as in the above-

cited cases, the Independent Counsel's power comports with the Constitution.

CONCLUSION

The Independent Counsel provisions of the Ethics in Government Act represent Congress's measured response to the recurrent question of how to enforce the laws of the United States when they are violated by high government officials. Congress chose to use its authority, well settled under the Constitution and Supreme Court precedent, to create a mechanism to guarantee the integrity and independence of criminal investigations in matters where the Department of Justice has real or apparent conflicts of interest. By carefully assigning the functions necessary for the accomplishment of its purpose, it has constitutionally addressed an important national need. For the United States, the Act represents a landmark effort to instill public confidence in the fair and ethical behavior of public officials.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: July 20, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE SEALED CASE	)	Misc. No. 87-0197
	)	(Under Seal)
	)	
	)	

Filed
August 18, 1987

ORDER

Upon consideration of the representations of counsel for Edward C. Schmults, the Office of Independent Counsel, and the entire record and all proceedings in this matter, the Court finds that:

On May 19, 1987, two grand jury subpoenas were issued to Edward C. Schmults to produce documents on June 4, 1987 and to appear before the grand jury on June 11, 1987;

On June 1, 1987, Mr. Schmults moved to quash the subpoenas, asserting that the Office of Independent Counsel was without authority to demand production or conduct grand jury proceedings because the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. § 591 *et seq.* ("the Act") were unconstitutional;

On June 8, 1987, the Office of Independent Counsel filed a brief opposing the motion to quash and defending the constitutionality of the Act;

On July 20, 1987, the Court issued a Memorandum that upheld the constitutionality of the Act and issued an Order denying the motion to quash;

By letter dated July 23, 1987, the Independent Counsel notified counsel for Mr. Schmults that the subpoenas for

documents and testimony were rescheduled for August 11 and August 17, 1987, respectively.

On August 3, 1987, Mr. Schmults, through counsel, advised the Office of Independent Counsel that on the advice of counsel, in order to pursue his challenge to the Act on appeal, he refused to furnish the requested documents or appear before the grand jury and did not so appear;

Mr. Schmults has requested a stay pending appeal of any Order of the Court holding him in contempt; and the Office of Independent Counsel has advised the Court that, without waiving the right to argue ripeness, standing, or related issues in the Court of Appeals, it will not oppose a stay pending appeal if Mr. Schmults appeals immediately and if he seeks expedited consideration of the appeal. Mr. Schmults, through counsel, has advised the Court that he believes the Office of Independent Counsel has already waived these issues, and that they cannot properly be raised in the Court of Appeals.

Upon the foregoing representations, it is hereby:

ORDERED, that Edward C. Schmults is found in contempt pursuant to 28 U.S.C. § 1826(a) for failure to furnish documents or testify as required by grand jury subpoenas dated May 19, 1987, and this Court's Order of July 20, 1987; and

IT IS FURTHER ORDERED that Edward C. Schmults is hereby confined for the life of the grand jury or until he complies with the Court Order of July 20, 1987; and

IT IS FURTHER ORDERED, that this Order is stayed pending appeal, conditioned on the requirement that Edward C. Schmults file a notice of appeal within twenty-four hours of the issuance of this Order and take the actions necessary to request expedited consideration of the appeal in the Court of Appeals.

/s/Thomas F. Hogan
UNITED STATES DISTRICT JUDGE
DATED: August 18, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE SEALED CASE	)	Misc. No. 87-215 (Under Seal)

Filed
August 18, 1987

ORDER

Upon consideration of the representations of counsel for Carol E. Dinkins, the Office of Independent Counsel, and the entire record and all proceedings in this matter, the Court finds that:

On June 4, 1987, two grand jury subpoenas were issued to Carol E. Dinkins to produce documents on June 16, 1987 and to appear before the grand jury on June 18, 1987;

On June 15, 1987, Ms. Dinkins moved to quash the subpoenas, asserting that the Office of Independent Counsel was without authority to demand production or conduct grand jury proceedings because the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. § 591 *et seq.* ("The Act") were unconstitutional;

On June 26, 1987, the Office of Independent Counsel filed a brief opposing the motion to quash and defending the constitutionality of the Act;

On July 20, 1987, the Court issued a Memorandum that upheld the constitutionality of the Act and issued an Order denying the motion to quash;

Thereafter, the Independent Counsel notified counsel for Ms. Dinkins that the subpoenas for documents and testi-

mony were rescheduled for August 4 and August 6, 1987, respectively.

On August 3, 1987, Ms. Dinkins, through counsel, advised the Office of Independent Counsel that on the advice of counsel, in order to pursue here challenge to the Act on appeal, she refused to furnish the requested documents or appear before the grand jury and did not so appear;

Ms. Dinkins has requested a stay pending appeal of any Order of the Court holding her in contempt; and the Office of Independent Counsel has advised the Court that, without waiving the right to argue ripeness, standing, or related issues in the Court of Appeals, it will not oppose a stay pending appeal if Ms. Dinkins appeals immediately and if she seeks expedited consideration of the appeal. Ms. Dinkins, through counsel, has advised the Court that she believes the Office of Independent Counsel has already waived these issues, and that they cannot properly be raised in the Court of Appeals.

Upon the foregoing representations, it is hereby:

ORDERED, that Carol E. Dinkins is found in contempt pursuant to 28 U.S.C. § 1826(a) for failure to furnish documents or testify as required by grand jury subpoenas dated May 19, 1987, and this Court's Order of July 20, 1987; and

IT IS FURTHER ORDERED, that Carol E. Dinkins is hereby confined for the life of the grand jury or until she complies with the Court Order of July 20, 1987; and

IT IS FURTHER ORDERED, that this Order is stayed pending appeal, conditioned on the requirement that Carol E. Dinkins file a notice of appeal within twenty-four hours of the issuance of this Order and take the actions necessary to request expedited consideration of the appeal in the Court of Appeals.

/s/Thomas F. Hogan
UNITED STATES DISTRICT JUDGE

DATED: 18th August 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE SEALED CASE	)	
	)	Misc. No. 87-0205
	)	(Under Seal)

Filed
August 19, 1987

ORDER

Upon consideration of the representations of counsel for Theodore B. Olson and for the Office of Independent Counsel, and the entire record and proceedings in this matter, the Court finds that:

On May 22, 1987, a grand jury subpoena *duces tecum* was issued to Theodore B. Olson to produce documents on June 9, 1987;

On June 9, 1987, Mr. Olson moved to quash the subpoena, asserting that the Office of Independent Counsel was without authority to seek the subpoenaed documents because the investigation violated the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-98 (the "Act"), and because the Act violated the United States Constitution;

On June 17, 1987, the Office of Independent Counsel filed a memorandum opposing the motion to quash and defending her investigation on statutory and constitutional grounds;

On June 24, 1987, Mr. Olson filed a reply to that opposition of the Office of Independent Counsel;

On July 20, 1987, the Court issued a public Memorandum that upheld the constitutionality of the Act, a sealed Memorandum rejecting Mr. Olson's statutory arguments, and a sealed Order denying the motion to quash;

On July 24, 1987, Mr. Olson filed a motion for reconsideration of the sealed Memorandum and Order;

On July 30, 1987, the Office of Independent Counsel filed an opposition to the motion for reconsideration;

On July 31, 1987, Mr. Olson filed a reply to that opposition to the motion for reconsideration;

On August 4, 1987, the Court issued a sealed Order denying the motion for reconsideration and ordering Mr. Olson to comply forthwith with the subpoena;

On August 4, 1987, Mr. Olson, through counsel, advised the Office of Independent Counsel by letter that on the advice of counsel, in order to use the only procedural mechanism for immediate appeal of the Court's ruling, he would not furnish the requested documents but would seek an expeditious appellate resolution of the issues presented in this case and has not furnished the documents; and

Mr. Olson has requested a stay pending appeal of any Order of the Court holding his in contempt, and the Office of Independent Counsel has advised the Court that, without waiving the right to argue ripeness, standing or related issues in the Court of Appeals, it will not oppose a stay pending appeal if Mr. Olson appeals immediately and if he seeks expedited consideration of the appeal. Mr. Olson has advised the Court, through counsel, that he believes the Office of Independent Counsel has already waived these issues and that they cannot properly be raised in the Court of Appeals.

Upon the foregoing representations, it is hereby:

ORDERED, that Theodore B. Olson is found in civil contempt pursuant to 28 U.S.C. § 1826(a) for failure to furnish the documents as required by the grand jury subpoena dated May 22, 1987, and the Court's sealed Order of August 4, 1987; and

FURTHER ORDERED, that Theodore B. Olson is hereby confined for the life of the grand jury or until he complies with the Court's sealed Order of August 4, 1987; and

FURTHER ORDERED, that this Order is stayed pending appeal, conditioned on the requirement that Theodore B. Olson file a notice of appeal within twenty-four hours of the issuance of this Order and take the actions necessary to request expedited consideration of the appeal in the Court of Appeals.

/s/Thomas F. Hogan
United States District Judge

Dated: August 19th, 1987.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE SEALED CASE	**Nos. 87-5261** **87-5264** **87-5265**

Received
February 1, 1988

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Independent Counsel Alexia Morrison, appellee in the above-entitled cases, hereby appeals to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the District of Columbia Circuit, holding unconstitutional the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§49, 591-598 (1982 Supp. III), entered in these cases on January 22, 1988.

This appeal is taken pursuant to 28 U.S.C. §1252.

/s/Alexia Morrison
Alexia Morrison
Independent Counsel
2600 Virginia Avenue, N.W.
Suite 1112
Washington, D.C. 20037
(202) 333-0025

February 1, 1988

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 1988, I caused to be served by hand a copy of the foregoing Independent Counsel's Notice of Appeal to the Supreme Court of the United States on the following:

Thomas S. Martin, Esq.
Jenner & Block
21 Dupont Circle, N. W.
Washington, D.C. 20036

Brendan V. Sullivan, Jr., Esq.
Williams & Connolly
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Jacob A. Stein, Esq.
Stein, Mitchell & Mezines
1800 M Street, N. W.
Washington, D.C.

/s/Alexia Morrison
Alexia Morrison

28 U.S.C. 49. Assignment of judges to division to appoint independent counsels

(a) Beginning with the two-year period commencing on the date of the enactment of this section, three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of appeals for the District of Columbia to be the division of the court for the purpose of appointing independent counsels.

(b) Except as provided under subsection (f) of this section, assignment to such division of the court shall not be a bar to other judicial assignments during the term of such division.

(c) In assigning judges or justices to sit on such division of the court, priority shall be given to senior circuit judges and retired justices.

(d) The Chief Justice of the United States shall designate and assign three circuit court judges or justices, one of whom shall be a judge of the United States Court of Appeals for the District of Columbia, to such division of the court. Not more than one judge or justice or senior or retired judge or justice may be named to such division from a particular court.

(e) Any vacancy in such division of the court shall be filled only for the remainder of the two-year period in which such vacancy occurs and in the same manner as initial assignments to such division were made.

(f) Except as otherwise provided in chapter 40 of this title, no member of such division of the court who participated in a function conferred on the division under chapter 40 of this title involving a [1] independent counsel shall be eligible to participate in any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that

[1] So in original.

office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office.
(Added Pub.L. 95-521, Title VI, § 602(a), Oct. 26, 1978, 92 Stat. 1873, and amended Pub.L. 97-407, § 2(b (1), Jan. 3, 1983, 96 Stat. 2039; Pub.L. 99-554, title I, § 144(g)(3), Oct. 27, 1986. 100 Stat. 3097.)

CHAPTER 40—INDEPENDENT COUNSEL

Sec.
591. Applicability of provisions of this chapter.
592. Application for appointment of a[1] independent counsel.
593. Duties of the division of the court.
594. Authority and duties of a[1] independent counsel.
595. Reporting and congressional oversight.
596. Removal of a[1] independent counsel; termination of office.
597. Relationship with Department of Justice.
598. Termination of effect of chapter.

EDITORIAL NOTES

Effective Date of Chapter. Section 604 of Pub.L. 95-621 provided in part that this chapter shall take effect on Oct. 26, 1978.

§ 591. Applicability of provisions of this chapter

(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives information sufficient to constitute grounds to investigate that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a Class B or C misdemeanor or an infraction.

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[1]So in original.

(b) The persons referred to in subsection (a) of this section are—

(1) the President and Vice President;

(2) any individual serving in a position listed in section 5312 of title 5;

(3) any individual working in the Executive Office of the President who is compensated at or above a rate equivalent to level II of the Executive Schedule under section 5313 of title 5;

(4) any Assistant Attorney General and any individual working in the Department of Justice compensated at a rate at or above level III of the Executive Schedule under section 5314 of title 5;

(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection during the period consisting of the incumbency of the President such individual serves plus one year after such incumbency, but in no event longer than two years after the individual leaves office;

(7) any individual described in paragraph (6) who continues to hold office for not more than 90 days into the term of the next President during the period such individual serves plus one year after such individual leaves office;

(8) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director, during the incumbency of the President.

(c) Whenever the Attorney General receives information sufficient to constitute grounds to investigate that any person not described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense, the Attorney General may conduct an investigation and apply for an independent counsel pursuant to the provisions of this chapter if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict f interest.

(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1867, and amended Pub.L. 97-409, §§ 3, 4(a), Jan. 3, 1983, 96 Stat. 2039, 2040; Pub.L. 98-473, Title II, § 228(b), Oct. 12, 1984, 98 Stat. 2030.)

EDITORIAL NOTES

Effective Date of 1984 Amendment. Amendment by Pub.L. 98-473 effective Oct. 12, 1984, see section 235(a)(1)(B)(ii)(IV) of Pub.L. 98—473, set out as an Effective Date note under section 3551 of Title 18, Crimes and Criminal Procedure. Pub.L. 99—646, § 35(2)(D), Nov. 10, 1986, 100 Stat. 3599, amended Pub.L. 99—473, § 235(a)(1)(B)(ii) to delete item (IV).

Applicability to Specific Information Relating to Pending Proceedings. Section 604 of Pub.L. 94—521 provided in part that the provisions of this chapter shall not apply to specific information received by the Attorney General pursuant to section 591, if the Attorney General determines that—

(1) such specific information is directly related to a prosecution pending at the time such specific information is received by the Attorney General;

(2) such specific information is related to a matter which has been presented to a grand jury and is received

by the Attorney General within 180 days of October 26, 1978; or

(3) such specific information is related to an investigation that is pending at the time such specific information is received by the Attorney General, and such specific information is received by the Attorney General within 90 days of October 26, 1978.

§ 592. Application for appointment of a[1] independent counsel

(a)(1) Upon receiving information that the Attorney General determines in sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate. In determining whether grounds to investigate exist, the Attorney General shall consider—

(A) the degree of specificity of the information received, and

(B) the credibility of the source of the information.

(2) In conducting preliminary investigations pursuant to this section, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(b)(1) If the Attorney General, upon completion of the preliminary investigation, finds there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint a[1] independent counsel.

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[1]So in original.

(2) Such notification shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.

(3) Such memorandum shall not be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

(c)(1) If the Attorney General, upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, or if ninety days elapse from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General shall apply to the division of the court for the appointment of a[1] independent counsel. In determining whether reasonable grounds exist to warrant further investigation or prosecution, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

(2) If—

(A) after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional information sufficient to constitute grounds to investigate about the matter to which such memorandum related, and

(B) the Attorney General determines, after such additional investigation as the Attorney General deems appropriate, that reasonable grounds exist to warrant further investigation or prosecution,

then the Attorney General shall, not later than ninety days after receiving such additional information, apply to the division of the court for the appointment of a[1] independent counsel.

(d)(1) Any application under this chapter shall contain sufficient information to assist the division of the court to select a[1] independent counsel and to define that independent counsel's prosecutorial jurisdiction.

(2) No application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

(e) the Attorney General may ask a[1] independent counsel to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction.

(f) The Attorney General's determination under subsection (c) of this section to apply to the division of the court for the appointment of a[1] independent counsel shall not be reviewable in any court.
(Added Pub.L. 95—521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1868, and amended Pub.L. 7-—409, §§ 2(a)(1), 4(b)—(e), Jan. 3, 1983, 96 Stat. 2039—2041.)

EDITORIAL NOTES

References in Text. The Act, referred to in subsec. (a)(1), probably means the Ethics in Government Act of 1978 which enacted this chapter. For complete classification of that Act to the Code, see Short Title note under section 701 of Title 2, The congress and Tables volume.

§ 593. Duties of the division of the court

(a) The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) Upon receipt of an application under section 592(c) of this title, the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction. A[1] inde-

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[1]So in original.

pendent counsel's identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event the identity and prosecutorial jurisdiction of such prosecutor[2] shall be made public when any indictment is returned or any criminal information is filed.

(c) The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of any existing independent counsel, and such expansion may be in lieu of the appointment of an additional independent counsel.

(d) The division of The court may not appoint as a[1] independent counsel any person who holds or recently held any office of profit or trust under the United States.

(e) If a vacancy in office arises by reason of the resignation or death of a[1] independent counsel, the division of the court may appoint a[1] independent counsel to complete the work of the independent counsel whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of a[1] independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed. Upon the completion of such judicial review, the division of the court shall take appropriate action.

(f) Upon a showing of good cause by the Attorney General, the division of the court may grant a single extension of the preliminary investigation conducted pursuant to section 592(a) of this title for a period not to exceed sixty days.

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[2]So in original. Substitution of "counsel" for "prosecutor" was not made by Pub.L. 97-409.

(g) Upon request by the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, in its discretion, award reimbursement for all or part of the attorney's fees incurred by such subject during such investigation if—

(1) no indictment is brought against such subject; and

(2) the attorney's fees would not have been incurred but for the requirements of this chapter.

(Added Pub.L. 95—521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1869, and amended Pub.L. 97—409, §§ 2(a)(1), 5, Jan. 3, 1983, 96 Stat. 2039, 2041.)

§ 594. Authority and duties of a[1] independent counsel

(a) Notwithstanding any other provision of law, a[1] independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel deems necessary;

(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and

(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

(b) A[1] independent counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

[1] So in original.

(c) For the purposes of carrying out the duties of the office of independent counsel, a[1] independent counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as such independent counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5.

(d) A[1] independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

(e) A[1] independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction. A[1] independent counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the independent counsel shall notify the division of the court.

(f) A[1] independent counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

(g) The independent counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

[1] So in original.

(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1869, and amended Pub.L. 97-409, §§ 2(a)(1), 6(a)-(c), Jan. 3, 1983, 96 Stat. 2039, 2041.)

EDITORIAL NOTES

References in Text. Section 6103 of the Internal Revenue Code of 1954, referred to in subsec. (a)(8), is classified to Title 26, U.S.C.A., § 6103.

§ 595. Reporting and congressional oversight

(a) A[1] independent counsel appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of such independent counsel. These statements and reports shall contain such information as such independent counsel deems appropriate.

(b)(1) In addition to any reports made under subsection (a) of this section, and before the termination of a[1] independent counsel's office under section 596(b) of this title, such independent counsel shall submit to the division of the court a report under this subsection.

(2) A report under this subsection shall set forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted.

(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report under this section available to any individual named in such report

[1] So in original.

for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

(c) A[1] independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

(d) The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(e) A majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of a[1] independent counsel. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of

[1] So in original.

such notification as will not in the committee's judgment prejudice the rights of any individual.
(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1871, and amended Pub.L. 97-409, § 2(a)(1), Jan. 3, 1983, 97 Stat. 2039.)

§ 596. Removal of a[1] independent counsel; termination of office

(a)(1) A[1] independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

(2) If a[1] independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, delete or postpone publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a report released under section 595(b)(3) of this title and under the same limitations as apply to the release of a report under that section.

(3) A[1] independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief.

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[1]So in original.

(b)(1) An office of independent counsel shall terminate when (A) the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the independent counsel files a report in full compliance with section 595(b) of this title.

(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the independent counsel shall file the report required by section 595(b) of this title.

(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1872, and amended Pub.L. 97-409, §§ 2(a)(1), 6(d), Jan. 3, 1983, 96 Stat. 2039, 2042; Pub.L. 98-620, Title IV, § 402(29)(A), Nov. 8, 1984, 98 Stat. 3359.)

EDITORIAL NOTES

Effective Date of 1984 Amendment. Amendment by Pub. L. 98-620 not to apply to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98-620, set out as an Effective Date note under section 1657 of this title.

§ 597. Relationshi with Department of Justice

(a) Whenever a matter is in the prosecutorial jurisdiction of a[1] independent counsel or has been accepted by a[1] independent counsel under section 594(e) of this title, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which a[1] independent counsel participates in an official capacity or any appeal of such a case or proceeding.
(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1872, and amended Pub.L. 97-409, § 2(a)(1)(A), Jan. 3, 1983, 96 Stat. 2039.)

§ 598. Termination of effect of chapter

This chapter shall cease to have effect five years after the date of the enactment of the Ethics in Government Act Amendments of 1982, except that this chapter shall continue in effect with respect to then pending matters before a[1] independent counsel that in the judgment of such special counsel require such continuation until that independent counsel determines such matters have been completed.
(Added Pub.L. 95-521, title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1873, and amended Pub.L. 97-409, §§ 2(a)(1)(A), 7, Jan. 3, 1983, 96 Stat. 2039, 2042.)

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[1]So in original.

[1]So in original.

ARTICLE II

Section 1. [1] The executive Power shall be vested in a President of the United States of America.

Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United states; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may be Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Section 3. He shall . . . take Care that the Laws be faithfully executed. . . . .

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Com-

pensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

MOTION FILED
FEB 1 1988

No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,
v.
THEODORE B. OLSON, EDWARD C. SCHMULTS
and CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL, IN SUPPORT OF JURISDICTIONAL STATEMENT

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Dated: February 1, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

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On Appeal from the United States Court of Appeals for the District of Columbia Circuit

---

MOTION OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Lawrence E. Walsh, Independent Counsel, respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner and of the attorneys for respondents Olson and Dinkins has been obtained. The consent of the attorney for respondent Schmults has been refused.

Lawrence E. Walsh was appointed as Independent Counsel in the Iran/Contra matter pursuant to the Independent Counsel statute on December 19, 1986. On March 5, 1987, Mr. Walsh received a parallel appointment as Independent Counsel in the Iran/Contra matter from the Attorney General pursuant to the Attorney

General's Independent Counsel regulation, 52 Fed. Reg. 7270 (Mar. 10, 1987), 9241 (Mar. 23, 1987), *codified at* 28 C.F.R. Parts 600 and 601. On August 20, 1987, the United States Court of Appeals for the District of Columbia Circuit held that Mr. Walsh and his Associate Counsel have legal authority to pursue their investigation of the Iran/Contra matter pursuant to the Attorney General's parallel appointment. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 56 U.S.L.W. 3482 (U.S. Jan. 19, 1988).

Although the authority of Mr. Walsh as Independent Counsel in the Iran/Contra matter has been upheld on the independent ground of the Attorney General's parallel appointment, Mr. Walsh requests to be heard as *amicus curiae* in support of the constitutionality of the Independent Counsel statute because he believes that his appointment as Independent Counsel in the Iran/Contra matter can and should be upheld under the statute as well as under the Attorney General's regulation.

Mr. Walsh also submits this *amicus* brief in order to call attention to an important factor not implicated in Independent Counsel Morrison's investigation which further supports the constitutionality of the Independent Counsel statute. The Independent Counsel statute contains two criteria pursuant to which the Attorney General may initiate the appointment of an Independent Counsel: 28 U.S.C. § 591(b) requires the appointment of an Independent Counsel in certain matters involving specified high government officials, while 28 U.S.C. § 591 (c) provides that the Attorney General "may" call for an Independent Counsel in other matters "if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest." The instant appeals relate to an Independent Counsel appointed under Section 591(b), while Mr. Walsh was appointed under Section 591(c).

Where the Attorney General relies upon 28 U.S.C. § 591(c) in initiating the appointment of Independent Counsel as he did in the Iran/Contra matter, the appointment of an Independent Counsel is in no sense compelled by the Independent Counsel statute, but rather represents a voluntary decision by the Executive Branch to avail itself of the mechanism provided by the statute to guarantee the independence and integrity of a specific criminal investigation as to which the Department of Justice may have a conflict of interest. The availability of the option provided by 28 U.S.C. § 591(c), and the fact that the Executive Branch chose to avail itself of that option in the Iran/Contra matter, strongly support the constitutionality of the Independent Counsel statute.

Respectfully submitted,

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Dated: February 1, 1988

QUESTIONS PRESENTED

1. May a statute constitutionally provide that, upon application by the Attorney General, an Independent Counsel shall be appointed to conduct a criminal investigation, where the investigation involves specified high government officials, or where the Attorney General determines that the conduct of such investigation by the Department of Justice may involve a conflict of interest?

2. Pursuant to the Appointments Clause of the United States Constitution (Article II, Section 2, Clause 2), may such a statute provide that Independent Counsel shall be appointed and his jurisdiction defined by a court?

3. To safeguard the independence of the investigation, may such a statute constitutionally provide that Independent Counsel may be removed by the Attorney General only for cause?

4. Does the appointment of an Independent Counsel to conduct a criminal investigation of specific and limited scope, where the conduct of such investigation by the Department of Justice might involve a conflict of interest, fatally invade the President's responsibility under Article II of the Constitution to "take Care that the Laws be faithfully executed"?

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---

BRIEF OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL, AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF AMICUS CURIAE

Amicus curiae Lawrence E. Walsh was appointed as Independent Counsel in the Iran/Contra matter pursuant to the Independent Counsel statute on December 19, 1986. On March 5, 1987, Mr. Walsh received a parallel appointment as Independent Counsel in the Iran/Contra matter from the Attorney General pursuant to the Attorney General's Independent Counsel regulation, 52 Fed.

Reg. 7270 (Mar. 10, 1987), 9241 (Mar. 23, 1987), *codified at* 28 C.F.R. Parts 600 and 601. On August 20, 1987, the United States Court of Appeals for the District of Columbia Circuit held that Mr. Walsh and his Associate Counsel have legal authority to pursue their investigation of the Iran/Contra matter pursuant to the Attorney General's parallel appointment. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 56 U.S.L.W. 3482 (U.S. Jan. 19, 1988).

Although the authority of Mr. Walsh as Independent Counsel in the Iran/Contra matter has been upheld on the independent ground of the Attorney General's parallel appointment, Mr. Walsh submits this brief as *amicus curiae* in support of the constitutionality of the Independent Counsel statute because he believes that his appointment as Independent Counsel in the Iran/Contra matter can and should be upheld under the statute as well as under the Attorney General's regulation.

Mr. Walsh also submits this brief in order to call attention to an important factor not implicated in Independent Counsel Morrison's investigation which further supports the constitutionality of the Independent Counsel statute. The Independent Counsel statute contains two criteria pursuant to which the Attorney General may initiate the appointment of an Independent Counsel: 28 U.S.C. § 591(b) requires the appointment of an Independent Counsel in certain matters involving specified high government officials, while 28 U.S.C. § 591(c) provides that the Attorney General "may" call for an Independent Counsel in other matters "if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest."

Where the Attorney General relies upon 28 U.S.C. § 591(c) in initiating the appointment of Independent Counsel, as he did in the Iran/Contra matter, the appointment of an Independent Counsel is in no sense compelled by the Independent Counsel statute, but rather represents a voluntary decision by the Executive Branch to avail itself of the mechanism provided by the statute to guarantee the independence and integrity of a specific criminal investigation as to which the Department of Justice may have a conflict of interest. The availability of the option provided by 28 U.S.C. § 591(c), and the fact that the Executive Branch chose to avail itself of that option in the Iran/Contra matter, strongly supports the constitutionality of the Independent Counsel statute.

STATEMENT OF THE CASE

This Statement of the Case will briefly summarize the application of the Independent Counsel statute in the Iran/Contra matter.

On December 2, 1986, one week after the initial announcement of a Department of Justice investigation of the events that came to be known as the Iran/Contra matter, Attorney General Meese announced that he had concluded that he should apply for the appointment of an Independent Counsel. On December 4, 1986, the Attorney General filed an application for appointment of an Independent Counsel with the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit. In his application, the Attorney General expressly determined that an Independent Counsel should be appointed pursuant to 28 U.S.C. § 591(c).

On December 19, 1986, the Special Division of the court of appeals filed an order appointing Lawrence E. Walsh as Independent Counsel in the Iran/Contra matter. Order Appointing Independent Counsel, *In re Oliver L. North, et al.*, Div. No. 86-6, Dec. 19, 1986. As re-

quested by the Attorney General, the Special Division authorized the Independent Counsel to investigate possible violations of federal criminal law by Oliver L. North, other United States Government officials, and individuals acting in concert with them. *Id.* at 1. The order of the Division clarified and to some extent broadened the subject matter scope of the investigation suggested by the Attorney General. *Id.* at 2.

On March 5, 1987, Attorney General Meese issued a regulation, 52 Fed. Reg. 7270 (Mar. 10, 1987), 9241 (Mar. 23, 1987), *codified at* 28 C.F.R. Parts 600 and 601, which created an "Office of Independent Counsel: Iran/Contra" and provided that office with the same jurisdiction and powers that it already possessed under the Ethics in Government Act and the December 19, 1986 court order appointing Independent Counsel. The Attorney General stated that his purpose in issuing the regulation was "to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." 52 Fed. Reg. at 7271. The Attorney General emphasized that "this rule is not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities." 52 Fed. Reg. at 7270-71.

Oliver L. North sought to test the legal authority of Independent Counsel by refusing to comply with a grand jury subpoena calling for certain unprivileged information. The district court and the court of appeals held that Mr. Walsh and his subordinates have legal authority to pursue their investigation pursuant to the Attorney General's parallel appointment, regardless of whether they also have such authority pursuant to the Independent Counsel statute. *In re Sealed Case*, Misc. No. 87-0139 (D.D.C. July 10, 1987), *aff'd*, 829 F.2d 50 (D.C. Cir. 1987). A petition for a writ of certiorari to review this decision was denied by this Court on January 19, 1988. *North v. Walsh*, 56 U.S.L.W. 3482 (U.S. Jan. 19, 1988).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL[1]

The split decision of the panel of the court of appeals in this case is the first judicial decision to hold the Independent Counsel statute unconstitutional. All other courts that have considered this question, including the district court in this case, have upheld the constitutionality of the statute.[2]

As shown below, the decision of the two-judge majority of the court of appeals panel striking down the Independent Counsel statute conflicts with the principles repeatedly recognized in decisions of this Court. Accordingly, review by this Court is urgently called for.

POINT I

THE INDEPENDENT COUNSEL STATUTE IS A MEASURED AND BALANCED RESPONSE TO THE PROBLEM OF INSURING THE INTEGRITY OF CRIMINAL INVESTIGATIONS OF HIGH OFFICIALS

As Chief Justice Rehnquist stated in denying a motion for stay of the return of an indictment in *Deaver v. Seymour*, 107 S. Ct. 3711 (1987), an attack upon the

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[1] Independent Counsel Walsh is aware of, and concurs with, appellant's request that this Court consider the instant matter as a direct appeal pursuant to 28 U.S.C. § 1252. Should the Court decide, however, that 28 U.S.C. § 1252 is not applicable, Independent Counsel Walsh submits that the issues presented herein are of exceptional importance and justify this Court's exercise of its certiorari jurisdiction and expedited consideration on the merits.

[2] *See In re Olson*, 818 F.2d 34, 43 (D.C. Cir., Div. for Purpose of Appointing Independent Counsels, 1987); *North v. Walsh*, 656 F. Supp. 414, 420 n.9 (D.D.C. 1987), *aff'd on other grounds*, No. 87-5058 (D.C. Cir. Oct. 1, 1987), *petition for cert. pending*, No. 87-1094; *Deaver v. Seymour*, 656 F. Supp. 900, 902 n.3 (D.D.C.), *aff'd on other grounds*, 822 F.2d 66 (D.C. Cir.), *stay denied*, 107 S. Ct. 3711 (1987); *Banzhaf v. Smith*, 588 F. Supp. 1498, 1504-08 (D.D.C.), *vacated on other grounds*, 737 F.2d 1167 (D.C. Cir. 1984) (*en banc*).

Independent Counsel statute must overcome "the presumption that an Act of Congress is constitutional." The two-judge majority of the court of appeals panel in the present case gave no weight to this presumption. It likewise gave no weight to the careful congressional consideration which gave rise to the Independent Counsel statute.

The enactment of the Independent Counsel statute stemmed from the experience of Watergate. *See Final Report of the Senate Select Committee on Presidential Compaign Activities*, 93rd Cong., 2d Sess. 80 (1974). Congress held lengthy hearings over a period of five years before enacting the Independent Counsel statute.[3] In the course of these hearings, Congress received extensive testimony in support of the constitutionality of such a statute, including testimony in 1977 from the Department of Justice.[4] Congress concluded that the Independent Counsel statute was both necessary and constitutional. *See* H.R. Rep. No. 95-1307, 95th Cong., 2d Sess. 2-6 (1978); S. Rep. No. 95-170, 95th Cong., 1st Sess. 5-7 (1977).

[3] *See, e.g., Special Prosecutor: Hearings Before the Senate Committee on the Judiciary*, 93rd Cong., 1st Sess. (1973); *Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 93rd Cong., 2d Sess. (1974); *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Committee on Government Operations*, 94th Cong., 1st Sess. (1975-1976); *Provision for Special Prosecutor: Hearings on H.R. 14476 et al. Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 94th Cong., 2d Sess. (1976); *Special Prosecutor Legislation: Hearings on H.R. 2835 and Related Bills Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 95th Cong., 1st Sess. (1977); *Public Officials Integrity Act of 1977: Hearings on S. 555 Before the Senate Committee on Governmental Affairs*, 95th Cong., 1st Sess. (1977).

[4] *See Public Officials Integrity Act of 1977: Hearings on S. 555 Before the Senate Committee on Governmental Affairs*, 95th Cong., 1st Sess. 14-27 (1977) (Testimony of John Harmon, Assistant Attorney General, Office of Legal Counsel).

The Independent Counsel statute which emerged from this careful process of congressional enactment and executive approval is a measured and balanced statute which is narrowly tailored to meet the critical problem which led to its enactment. The Executive Branch, in the person of the Attorney General, plays an indispensable role in the invocation of the Independent Counsel statute. An Independent Counsel cannot be appointed under the statute unless and until the Attorney General has applied for such an appointment, either on the ground (which the Attorney General invoked in the instant case) that there are reasonable grounds to investigate a possible violation of a federal criminal law by one of the high Federal officials and campaign officials listed in 28 U.S.C. § 591(b), or on the ground (which the Attorney General expressly invoked in the Iran/Contra matter) that "investigation . . . by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest." 28 U.S.C. § 591(c).[5]

In addition to his crucial role in initiating the appointment of an Independent Counsel, the Attorney General is empowered to remove an Independent Counsel "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of

[5] The Attorney General's crucial role is underscored by the fact that the courts have held that the Attorney General's refusal to apply for appointment of an Independent Counsel is not subject to judicial review, *see, e.g., Dellums v. Smith*, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984) (*en banc*), and that the Special Division may not expand the jurisdiction of an existing Independent Counsel to include matters which the Attorney General has previously and specifically determined should not be pursued. *In re Olson*, 818 F.2d 34, 47-48 (D.C. Cir., Div. for Purpose of Appointing Independent Counsels, 1987).

such independent counsel's duties." 28 U.S.C. § 596 (b)(1).[6] The court which appointed the Independent Counsel, by contrast, has no power of removal; its power is limited to that of terminating the Office of Independent Counsel on a finding that the work of the Office has been "completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." 28 U.S.C. § 596(c)(2).

In sharp contrast with the crucial role of the Attorney General under the Independent Counsel statute is the limited and passive role of Congress. Under the Independent Counsel statute, Congress has a role in five extremely limited respects. First, Independent Counsel may make public reports and send them to Congress. 28 U.S.C. § 595(a). Second, appropriate congressional committees retain oversight over Independent Counsel. 28 U.S.C. § 595(d). Third, Independent Counsel must advise the House of Representatives of substantial and credible information which may constitute grounds for impeachment. 28 U.S.C. § 595(c). Fourth, the Attorney General must provide a written response if a majority of members of either party of either House's Judiciary Committee requests the appointment of an Independent Counsel. 28 U.S.C. § 595(e). Fifth, the Attorney General must provide the Judiciary Committees with a report regarding a decision to remove an Independent Counsel. 28 U.S.C. § 596(a)(2).

None of these reporting and oversight provisions of the Independent Counsel statute in any way limits the powers of the Attorney General and the Independent Counsel under the statute, or aggrandizes any of those powers to

[6] Congress adopted this "good cause" standard for removal, at the suggestion of the Department of Justice, in order to conform the standard for removal of Independent Counsel to that applicable to members of independent agencies. S. Rep. No. 496, 97th Cong., 2d Sess. 17 (1982).

Congress. On the contrary, these reporting and oversight provisions are similar to those which are routinely imposed by statute upon the Attorney General himself.[7] Similar requirements are also typically imposed on other Executive Branch officials.[8]

The powers of the Special Division of the court of appeals which appoints Independent Counsel are likewise carefully circumscribed. As noted above, the Special Division has no role whatever unless and until the Attorney General has applied for the appointment of Independent Counsel. When such an application is made, the Special Division has the duty of appointing Independent Counsel and defining his prosecutorial jurisdiction. 28 U.S.C. § 593(b). The Special Division is likewise empowered to expand the jurisdiction of an existing Independent Counsel, 28 U.S.C. § 593(c), and to fill a vacancy in the office of Independent Counsel. 28 U.S.C. § 593(e). The Special Division also has responsibilities in connection with the termination of the work of an Independent Counsel, namely, to receive and consider publication of the final report of an Independent Counsel, 28 U.S.C. § 595(b), and, as noted above, to terminate the Office of Independent Counsel upon a finding that its work is complete or nearly complete. 28 U.S.C. § 596(b)(2). Finally, the Special Division has discretion to grant attorney's fees to certain subjects of an Independent Counsel's investigation, 28 U.S.C. § 593(g), and to review the removal of Independent Counsel by the Attorney General. 28 U.S.C. § 596(b)(3).

The Special Division of the court of appeals has no ongoing responsibilities with respect to the work of In-

[7] *See, e.g.*, 15 U.S.C. § 639(c); 18 U.S.C. App. § 13(a); 28 U.S.C. §§ 522, 529; 30 U.S.C. § 208-2; 42 U.S.C. § 2000aa-11(b); 50 U.S.C. App. § 1984(c).

[8] *See INS v. Chadha*, 462 U.S. 919, 955 n.19 (1983) (imposition of "formal reporting requirements" on administrative agencies "lies well within Congress' constitutional power").

dependent Counsel. Contrary to the speculations of the majority of the panel below (*see* Slip Op. at 76), the Special Division receives no interim reports from Independent Counsel, and exercises no power of supervision or control.[9] Except for the carefully circumscribed functions summarized above, the court exercises no functions with respect to Independent Counsel.

Thus, under the Independent Counsel statute, the Attorney General retains a decisive role in the invocation of the statute and in the removal of Independent Counsel once appointed; the Legislative Branch has no functions other than reporting and oversight; and the responsibilities of the Judicial Branch are narrowly limited.

POINT II

THE INDEPENDENT COUNSEL IS AN "INFERIOR OFFICER" AND JUDICIAL APPOINTMENT OF INDEPENDENT COUNSEL IS EXPRESSLY AUTHORIZED BY THE APPOINTMENTS CLAUSE OF THE CONSTITUTION

The Independent Counsel statute authorizes the Special Division of the court of appeals, upon request of the Attorney General, to appoint an Independent Counsel. *See* 28 U.S.C. §§ 49(a), 593(b). This delegation of the appointment function to the Special Division is expressly authorized by Article II, Section 2, Clause 2 (the Appointments Clause) of the Constitution, which provides that the President:

> "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the

[9] With respect to Independent Counsel in the Iran/Contra matter, the district court expressly found that the Special Court has not interfered in the grand jury investigation. *In re Sealed Case*, Misc. No. 87-0139, at 9-10 (D.D.C. July 10, 1987), *aff'd*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 56 U.S.L.W. 3482 (U.S. Jan. 19, 1988).

> Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, *in the Courts of Law*, or in the Heads of Departments." (Emphasis added.)

The Appointments Clause divides the "Officers of the United States" into two categories: those principal officers who must be appointed by the President and confirmed by the Senate, and those "inferior Officers" whose appointment Congress may vest in the President alone, in the courts of law, or in the heads of departments. Notwithstanding Congress' determination to the contrary, the panel majority below held that the Independent Counsel is not an "inferior Officer," but rather a principal officer who must be appointed by the President and confirmed by the Senate (Slip Op. at 10-23).

In reaching this conclusion, the panel majority expressly rejected (Slip Op. at 16-17) this Court's long-established standard for identifying inferior as opposed to principal officers, under which "inferior Officers" are "officers inferior to those specially mentioned" in the Appointments Clause. *United States v. Germaine*, 99 U.S. 508, 509-10 (1879), *quoted in Buckley v. Valeo*, 424 U.S. 1, 125 (1976). Under this standard, the Independent Counsel is clearly an "inferior Officer," because she is not an officer specially mentioned in the Appointments Clause of the Constitution.

After discarding this Court's test, the majority of the court below then undertook what it described as a "functional interpretation" of the Independent Counsel's role in order to determine whether she is an inferior officer (*see* Slip Op. at 17-18). Contrary to the view of the two-judge majority below, such a functional assessment clearly leads to the conclusion that Independent Counsel is an "inferior Officer." The Independent Counsel's role is temporary, episodic, and explicitly limited by her man-

date from the Court. She is appointed only after the Attorney General has determined that specific statutory criteria have been met.[10]

The authority of Independent Counsel is likewise limited to that necessary to carry out the purpose of the statute. The statute provides Independent Counsel with "full power and independent authority" to exercise the investigative and prosecutorial functions of the Department of Justice (other than the Attorney General's authority to approve wiretaps under 18 U.S.C. § 2516). 28 U.S.C. § 594(a). The authority of Independent Counsel is limited, however, to "such independent counsel's prosecutorial jurisdiction established under this chapter," 28 U.S.C. § 594(a), and ceases when the investigation and prosecution of matters within that jurisdiction have been completed or substantially completed. 28 U.S.C. § 596(b). Moreover, 28 U.S.C. § 594(f) provides that Independent Counsel "shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws."

The majority of the panel below likewise departed from the plain language and accepted interpretation of the Appointments Clause by holding that Independent Counsel cannot be an "inferior Officer" because there is no "superior officer" who can direct Independent Counsel in the fulfillment of her duties or who can remove Independent Counsel at will (Slip Op. at 20). This holding is simply inconsistent with the plain language of the Appointments Clause, which does not require that all

[10] Both the tenure of office and the scope of responsibilities are far more limited than a United States Attorney's continuing obligation to prosecute and defend all civil and criminal actions on behalf of and against the United States in the appropriate district, and the temporary appointment of United States Attorneys by the courts have been upheld under the "inferior Officers" clause. *See United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963).

"inferior Officers" be subject to a "superior officer". The word "inferior" does not necessarily mean "subordinate to a superior"; it may (and more often does) mean "lower in place or importance" without meaning "subordinate".[11] No decision of this Court has held that an "inferior Officer" must be subordinate to the directives of a "superior officer", or must be removable at will.[12]

The further holding of the two-judge majority below that the Appointments Clause does not permit "inter-branch appointments" (Slip Op. at 20, 35-38) again reads into the Appointments Clause a restriction which its language does not express, and flatly conflicts with this Court's decision in *Ex parte Siebold*, 100 U.S. 371 (1880). In *Siebold*, the Court upheld a federal statute which authorized the circuit courts to appoint federal election supervisors, a classic function of the Executive Branch.[13]

[11] The 1785 edition of Dr. Johnson's dictionary demonstrates that "subordinate" was not the primary meaning of "inferior" at the time the Constitution was drafted; in order of preference, the definitions of "inferior" given therein were, first, lower in place; second, lower in station or rank of life; third, lower in value or excellency; and last, subordinate. S. Johnson, *A Dictionary of the English Language in Which the Words Are Deduced From Their Originals* (1785). *See also* 5 *Oxford English Dictionary* 49 (1933).

[12] To the contrary, the election supervisors whose judicial appointment was upheld by this Court in *Ex parte Siebold*, 100 U.S. 371, 397-98 (1880), were not subordinate to or removable by any "superior officer", although they had certain reporting obligations to the chief supervisor of elections in each judicial district. *See* 16 Stat. 433-38 (1870). Moreover, this Court held in *United States v. Eaton*, 169 U.S. 331, 343 (1898), that a Vice Consul remains an "inferior Officer" even when he takes the place of the Consul, who is not an "inferior Officer": "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official."

[13] The majority of the panel below attempts to reconcile the result in *Siebold* with its view that "inter-branch appointments" are prohibited by suggesting that the election commissioners in *Siebold*

The Court there stated:

> "It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution[.]
>
> • • • •
>
> But the duty to appoint inferior officers when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void." 100 U.S. at 397-98.

Contrary to the suggestion of the panel majority (Slip Op. at 37-38), there is no "incongruity" about the appointment of Independent Counsel by a court. For example, as noted above, courts have long appointed and continue in certain circumstances to appoint interim United States Attorneys, free from any constitutional impropriety. *See United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963). Again, "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate [criminal contempt] proceedings when the need arises." *Young v. United States ex rel. Vuitton et Fils*, 107 S. Ct. 2124, 2134 (1987).[14] The real "incongruity" would arise if a court were to compel the Attorney General to select the prosecutor charged to conduct an investigation as to which the Department of Justice or the Attorney General himself has a conflict of interest.

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were really officers of Congress (Slip Op. at 20, 36-37). This suggestion finds no support in the *Siebold* opinion or in the 1870 statute which was before the Court in *Siebold*.

[14] Simply because the court below could imagine a parade of "incongru[ous]" horribles (*see* Slip Op. at 39-40) does not mean that Congress' sensible formulation in the Independent Counsel statute follows in that procession.

POINT III

THE LIMITATIONS UPON THE ATTORNEY GENERAL'S POWER TO REMOVE INDEPENDENT COUNSEL ARE CONSTITUTIONAL

The Independent Counsel statute authorizes the Attorney General to remove Independent Counsel, but "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1). The majority of the court below held that these limitations upon the Attorney General's power to remove Independent Counsel are unconstitutional, and that under the Constitution the Attorney General must be absolutely free to remove Independent Counsel at any time for any reason (or for no reason at all) (Slip Op. at 42-58). Once again, the decision of the majority below reflects a rigid and erroneous view of separation of powers.

The majority relied principally upon *Myers v. United States*, 272 U.S. 52 (1926), *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), but those cases are inapposite. In *Bowsher* and *Myers*, the Court held unconstitutional statutes in which Congress reserved *to itself* power over the removal of officials: Congress itself possessed removal power in *Bowsher*, and the Senate possessed veto power over removals in *Myers*. In *Humphrey's Executor*, this Court *upheld* a statute which permitted the President to remove an Executive Branch official only for good cause. In the present case, Congress has not reserved to itself any power over the removal of Independent Counsel. Instead, as in *Humphrey's Executor*, Congress has merely enacted statutory standards regulating the removal of Independent Counsel by the Executive. Neither *Bowsher* nor *Myers* holds such standards unconstitutional.

The constitutionality of the limitations upon the power of the Attorney General to remove Independent Counsel is sustained by two distinct lines of authority in this Court. First, the Court has stressed the "sharp differentiation . . . between those who are part of the Executive establishment and those whose tasks resquire freedom from Executive interference," and has made clear that the latter are not constitutionally subject to removal at will by the President. *Wiener v. United States*, 357 U.S. 349, 353 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602, 626-32 (1935). The panel majority attempted to distinguish *Wiener* and *Humphrey's Executor* as cases involving quasi-judicial officials (Slip Op. at 46-47), but this Court did not so limit those decisions; instead, the Court spoke of "those whose tasks require freedom from Executive interference," a category which clearly includes Independent Counsel.[15] The limitations upon the power of the Attorney General to remove Independent Counsel are essential in order to safeguard the independence of Independent Counsel, and are therefore fully consonant with the Constitution.

Second, the limitations upon the Attorney General's power to remove Independent Counsel are constitutional for still another reason. As shown in Point II above, Congress has validly lodged the appointment of Independent Counsel in the Special Division of the court of appeals pursuant to the Appointments Clause of the Constitution. In *United States v. Perkins*, 116 U.S. 483, 485 (1886), this Court held that where the appointment of an official is lodged in an entity other than the President pursuant to the Appointments Clause, the "constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to

[15] Moreover, *Humphrey's Executor* involved a Commissioner of the Federal Trade Commission, which has enforcement as well as quasi-judicial responsibilities.

officers so appointed." *Perkins* was cited with approval even in *Myers v. United States*, 272 U.S. 52, 161 (1926), whose sweeping view of the Executive power of removal was subsequently disapproved by the Court in *Humphrey's Executor v. United States*, 295 U.S. 602, 626 (1935).

POINT IV

THE NAMING OF AN INDEPENDENT COUNSEL DOES NOT INVADE THE PRESIDENT'S CONSTITUTIONAL POWERS

The majority of the court below also held that any exercise of independent authority by an Independent Counsel constitutes an invasion of Executive Branch authority and impairs the Executive's ability to "take Care that the Laws be faithfully executed." The panel majority's rigid and absolutist view of the Executive Branch's power conflicts with the more modulated and functional approach this Court has taken.

This Court has regularly approved statutes which insulate some functions of inferior executive officers from direct Presidential supervision and control. In short, the mere fact that a function relates to others exercised by the Executive does not mean that every facet of that function must be under total executive control. In *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838), this Court held that Congress may "impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the discretion of the President." In *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), the Court held that Congress might free from direct Presidential control the members of the Federal Trade Commission, which exercises both enforcement and quasi-judicial responsibilities, because "[t]he commission is to be nonpartisan; and it must, from the

very nature of its duties, act with entire impartiality." In *Wiener v. United States*, 357 U.S. 349, 353 (1958), the Court again held that Congress may confer independence from Presidential control upon "those whose tasks require absolute freedom from Executive interference". Most recently, in *Bowsher v. Synar*, 106 S. Ct. 3181, 3188 n.4 (1986), this Court emphasized that nothing in its separation of powers analysis required "casting doubt on the status of 'independent' agencies."

The authorities relied upon by the panel majority are not to the contrary. In both *Bowsher* and *INS v. Chadha*, 462 U.S. 919 (1983), this Court rested its holdings on specific instances of congressional overreaching: the congressional ability to remove the Comptroller General in *Bowsher*, and the congressional attempt to legislate without bicameralism and presentment to the President in *Chadha*. In the present case, there is no such direct congressional role. The powers of Congress under the Independent Counsel statute, as noted in Point I above, are limited to standard reporting and oversight provisions. Congressional overreaching, the evil emphasized by the Court in both *Bowsher* and *Chadha*, is entirely absent here.

Where, as here, there has been no attempt to aggrandize the powers of Congress at the expense of the Executive, this Court's approach, as recognized by Judge Ginsburg in the dissent below (Slip Op. at 14-18), rests less on a formulaic labeling of functions as "executive" in nature, and more on a balancing of the justification for the legislation and its impact upon the functions of the Executive. For example, in *Nixon v. General Services Administration*, 433 U.S. 425 (1977), this Court held:

> "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its

> constitutionally assigned functions. *United States v. Nixon*, 418 U.S. at 711-12 . . . Only where the potential for disruption is present must we determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." 433 U.S. at 443.

Similarly, in *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986), decided the same day as *Bowsher*, this Court clarified the separation of powers analysis applicable where, as here, there is some encroachment on one branch, but no transfer of function to another. The approach approved in *Schor* allows a court weighing a separation of powers challenge not only to consider the nature and extent of the intrusion, as the majority below did, but also the purpose the rearrangement is designed to serve. *Schor* specifically instructs courts to consider the "concerns that drove Congress to depart from the requirements of Article III." *Schor*, 106 S. Ct. at 3258.

When measured by the standards laid down by this Court, the independent status of Independent Counsel is clearly constitutional. Such independence is essential to avoid the conflict of interest which would result if the President were to seek to control criminal investigations and prosecutions involving himself and high officials in his administration. By avoiding grave problems of conflict of interest which would otherwise be unavoidable, the Independent Counsel statute enhances, rather than detracts from, the system of checks and balances established by the Constitution.

CONCLUSION

For all of the foregoing reasons, probable jurisdiction should be noted (or, in the alternative, a writ of certiorari should issue), and the case should be set down for expedited consideration and determination on the merits.

Respectfully submitted,

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Dated: February 1, 1988

Supreme Court, U.S.
FILED
FEB 12 1988
CLERK

No. 87-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS,
and CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF APPELLEES SCHMULTS AND DINKINS

Edward C. Schmults and Carol E. Dinkins, appellees in the above-entitled case, file this memorandum in response to the Jurisdictional Statement filed by Independent Counsel Alexia Morrison seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in *In re Sealed Cases*, Nos. 87-5261, 5264 and 5265 (Jan. 22, 1988). That decision held that the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591 *et seq.*, are unconstitutional.

This case presents the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act. That Act authorizes a special three-judge court to appoint an independent counsel who exercises all the prosecutorial authority and discretion of the Attorney General of the United States with respect to a certain range of activity. The Act additionally authorizes the special court to define that independent counsel's prosecutorial jurisdiction and to review *de novo* and overrule any effort by the Attorney General to remove an independent counsel. Appointment of an independent counsel by the special court therefore divests the Attorney General of any power to participate in, guide, or control any aspect of the matter within the independent counsel's jurisdiction.

While appellees believe the court of appeals' ruling was absolutely correct and should be affirmed by this Court, appellees do not move for dismissal or summary affirmance. As appellant notes in her Jurisdictional Statement (at 2), appellate jurisdiction is proper under 28 U.S.C. § 1252, since the court of appeals struck down federal legislation as unconstitutional in the context of a civil contempt proceeding. Moreover, although appellees believe that the constitutional defects in the Act are clear for the reasons stated by the court of appeals, appellees agree that full briefing and argument is appropriate in a case of this significance. *See* Sup. Ct. R. 16.1(c).

Appellees note, however, that the "ripeness" issue presented on this appeal is not properly before this Court. As the court of appeals ruled, appellees' challenge to the authority of the independent counsel is "ripe" and, in any event, as the court of appeals also ruled, appellant waived her "ripeness" argument by her failure to raise it in the district court. (J.S. App. 9 n.6). Her effort to raise that issue anew in this Court, and to force full briefing

on that issue if probable jurisdiction is noted, is wholly unwarranted.

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Dated: February 12, 1988

Supreme Court, U.S.
FILED
FEB 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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MOTION TO AFFIRM OF APPELLEE THEODORE B. OLSON

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

---

MOTION TO AFFIRM OF APPELLEE THEODORE B. OLSON

This case presents an important but straightforward application of settled constitutional principles concerning the separation of powers. The independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-598 (the "Act"), strip the Executive of its "exclusive authority and absolute discretion" to enforce the federal criminal laws, *United States v. Nixon*, 418 U.S. 683, 693 (1974), and place that awesome power in the hands of an official who, in name and fact, is independent of the normal protections against abuse of executive power built into the Constitution. Equally dangerously, the Act com-

promises the neutrality of the Judiciary by imposing on an Article III court the duty to appoint this prosecutor, to define the scope and responsibilities of her office, to supervise her performance, and to determine whether she may be removed and when her office should terminate.

Faced with a scheme that turns law enforcement authority over to unaccountable individuals who apply discriminatory standards of justice and carry an unavoidable bias toward prosecution, the Court of Appeals had no choice but to declare this statute unconstitutional. It merely applied "our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *United States v. United States District Court*, 407 U.S. 297, 317 (1972). This case presents "no abstract dispute concerning the doctrine of separation of powers. The rights of individuals are at stake." *In re Sealed Case*, slip op. at 88 (D.C. Cir. Jan. 22, 1988).

STATEMENT OF THE CASE

Almost two years ago, on April 23, 1986, the Independent Counsel Division of the United States Court of Appeals for the District of Columbia Circuit (the "Special Court") appointed an independent counsel to investigate two discrete aspects of approximately one hour of public, unsworn congressional testimony by appellee Theodore B. Olson, given on March 10, 1983, in his capacity as Assistant Attorney General for the Office of Legal Counsel in the Department of Justice. Mr. Olson's testimony related to the legal advice he gave to the President and other members of the Executive Branch regarding the President's assertion of an executive privilege claim.[1]

[1] There has never been any allegation that Mr. Olson's testimony sprang from a motivation that was corrupt or designed to generate personal or financial advantage of any kind.

In November 1986, after six months of her own investigation, which followed over three years of congressional and Justice Department review, independent counsel declared that Mr. Olson's testimony standing alone "probably does not constitute a prosecutable violation of any federal criminal law." [2]

The next six months of independent counsel's investigation were consumed by her efforts to expand her authority to investigate charges against two other former Justice Department officials that the Department of Justice earlier had found no basis to pursue.[3] Independent counsel's efforts to expand her jurisdiction were ultimately rebuffed both by the Attorney General and the Special Court.[4]

Thereafter, in May 1987, independent counsel served grand jury subpoenas *duces tecum* on Mr. Olson and the two individuals over whom she was denied jurisdiction. She subsequently precipitated this constitutional litigation, in June 1987, by declining to agree that Mr. Olson could preserve his constitutional challenge to the Act if he complied with the subpoena. Mr. Olson then moved to quash the subpoena.

The District Court denied the motion on July 20, 1987. On August 19, 1987, the District Court entered a stipulated order which provided that, "in order to use the only procedural mechanism for immediate appeal," Mr. Olson would be found in civil contempt for failure to furnish the subpoenaed documents. The Court of Appeals held the Act unconstitutional on January 22, 1988.

[2] *In re Olson*, 818 F.2d 34, 38 (D.C. Cir. Indep. Counsel Div. 1987) (quoting letter from independent counsel to the Attorney General).

[3] *See id.* at 47; *see In re Sealed Case*, slip op. at 78.

[4] *In re Olson*, 818 F.2d at 47.

ARGUMENT

I. The Act Is Unconstitutional.

The Court of Appeals' comprehensive 88-page opinion conclusively demonstrates that the independent counsel statute "so jeopardizes individual liberty," "so deeply invades the President's executive prerogatives and responsibilities," and so "blurs that cherished separation of prosecutor and judge," that it violates multiple protections for individual liberty guaranteed by our Constitution. *In re Sealed Case*, slip op. at 42, 74. Fundamental principles compel the conclusion that the Act violates Article II, Article III, and the Appointments Clause of the Constitution.

That the Act violates Section 3 of Article II follows inevitably from two simple propositions, the first settled by this Court and the second a truism about the Act. First, the prosecutorial function "has long been regarded as the special province of the Executive Branch, inasmuch as it is the executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).[5] With respect to criminal investigations and prosecutions, the Executive has authority that is "exclusive" and discretion that is "absolute." *United States v. Nixon*, 418 U.S. at 693.

Second, "the Ethics in Government Act's purpose and effect are to deprive the President of *any* supervisory role over the independent counsel." *In re Sealed Case*, slip op. at 68 (emphasis in original). Section 594(a) of Title 28 vests in independent counsel the "full power and independent authority" of the President to enforce federal criminal laws against selected individuals, and § 597 explicitly preempts the Executive's entire authority over any matter in the independent counsel's prosecutorial jurisdiction. This office was created for the specific purpose of being "free from . . . the control of the Executive Branch." S. Rep. No. 496, 97th Cong., 1st Sess. 2 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News, 3537-38. Thus, the Act restricts each component of the Executive's prosecutorial authority—appointment, supervision, and removal. Stripping the Executive of prosecutorial power entrusted to it by Article II is, by definition, unconstitutional.

The Act's immersion of the Judiciary in matters of prosecutorial discretion constitutionally entrusted to the Executive conflicts with the core requirement of Article III that courts must "abstain from exercising any power that is not strictly judicial in character and which is not clearly confided to it by the Constitution." *Muskrat v. United States*, 219 U.S. 346, 355 (1911). The strict jurisdictional limitation of Article III "defines the 'role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.'" *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). Decisions about whom and what to investigate and prosecute are "not readily susceptible to the kind of analysis courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985).

The Act runs roughshod over these bedrock principles. As even the dissent below recognized, the Special Court has the power not only to make "ad hoc appointments" of independent counsel but also to "defin[e] her office and responsibilities," including her prosecutorial jurisdiction, and to review her removal. *In re Sealed Case*, slip op. at 37 & n.46, 24-28 (Ginsburg, J., dissenting). The Act

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[5] *Accord, e.g., Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("The power to decide when to investigate, and when to prosecute, lies at the *core* of the Executive's duty to see to the faithful execution of the laws") (emphasis added); *United States v. Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965).

gives the Special Court open-ended supervisory authority over the ongoing course of independent counsel investigations. *In re Sealed Case*, slip op. at 80-81, 86-87.

Finally, the Act violates the Appointments Clause of Article II by depriving the President of his constitutional power to appoint superior officers with the advice and consent of the Senate. The Appointments Clause requires "Officers of the United States" to be appointed by the President, except for "inferior" officers who may be otherwise appointed. Any single official exercising the full prosecutorial authority of the United States is clearly a superior officer. Independent counsel cannot be an inferior officer because she has no superior: if the Judiciary is her superior, then even the dissent below admits that Article III boundaries are breached (*In re Sealed Case*, slip op. at 19 n.18); if Congress is her superior, then Congress has unconstitutionally assigned itself prosecutorial functions, and at the expense of the Executive; the Executive cannot be her superior because the Act deliberately insulates her from Executive control. Even if independent counsel is deemed an "inferior" officer, it is incongruous and unconstitutional for an officer performing such a core executive function as the prosecution of criminal offenses to be appointed by an entity outside the Executive Branch. *In re Sealed Case*, slip op. at 23.

This reassignment of the Executives' prosecutorial power by the Ethics in Government Act poses a unique threat to individual liberty. "Authority to prosecute an individual is that government power which most threatens personal liberty, for a prosecutor 'has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.'" *In re Sealed Case*, slip op. at 24, quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2141 (1987).

As the Court of Appeals recognized, the independent counsel process creates an inevitable bias toward indictment,[6] subjects government officials to a discriminatory standard of justice,[7] and deprives independent counsel of the institutional perspective that separates inconsequential matters from those of law enforcement significance.[8] These problems directly result from the fragmentation and dispersal of Executive functions and the lack of accountability to any elected official.[9] The Framers

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[6] *In re Sealed Case*, slip op. at 70-71 ("A person occupying this statutory office has, it seems to us, unique incentives to seek an indictment. . . . In effect, an entire self-sufficient government agency is created from scratch to investigate and perhaps prosecute a single individual. . . . The independent counsel is thus 'subject to formidable public—and perhaps self-imposed—pressure to indict in the one case he was appointed to pursue.'") (quoting former Attorney General Edward H. Levi).

[7] *Id.* at 73-74, 57 ("The consequence of this scheme . . . is that targets of an independent counsel may be subjected to investigations and prosecutions governed by rules different from those that apply to the investigation of any other citizen and therefore it strikes at the very heart of the unitary executive doctrine, which has as a primary purpose the 'unitary and uniform administration of the laws.'") (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)).

[8] *Id.* at 72 ("Wise exercise of prosecutorial discretion is dependent in part upon access to officials who are participants in the ongoing process of enforcing the law and who are able to take a longer view of an individual case. Yet the independent counsel is cut off from the accumulated lore and wisdom of career Department of Justice officers, who are in a unique position to evaluate '[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan.'") (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

[9] *Id.* at 27-28 ("The Framers provided for a unitary executive to ensure that the branch wielding the power to enforce the law would be accountable to the people. . . . Not merely an abstract idea of political theory, the President's accountability is a hallmark of our democracy—perhaps best put in President Truman's gritty aphorism

foresaw, and intended to prevent, this danger through "unity in the Executive" as "the best safeguard against tyranny." [10]

Equally important, the Act deprives the subject of the investigation of the opportunity to have these and other issues adjudicated by a truly neutral judiciary totally divorced from the prosecutor.[11] Judicial participation in prosecutorial decisions necessarily undermines the courts' ability to act as a check on improper applications of prosecutorial discretion. The decision below details the ways in which the Special Court has unilaterally protected its prosecutorial proteges without even the benefit of adversarial proceedings. *In re Sealed Case*, slip op. at 77-87. The Act has caused precisely the loss of neutrality that Article III is intended to prevent.

Independent counsel complains that this Court's decisions "provide less than clear guidance" about separations of powers principles.[12] Assigning, consistent with our tripartite system of government, powers that cannot

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'The buck stops here.' For no federal government function is it more vital to the protection of individual liberty that ultimately the buck stop with an accountable official—the President—than in the prosecution of criminal laws.").

[10] 1 Records of the Federal Convention 64, 68; Federalist 70 (Hamilton).

[11] *In re Sealed Case*, slip op. at 86 (the Act "implicates the course of a federal criminal investigation, which, if there were an indictment, must necessarily come before the federal courts for trial and, in all likelihood, appeal. In any such trial or appeal, the defendant may wish to call the court's attention to misconduct by the independent counsel or by the independent counsel's superior, who, as we have shown, in practical terms is the Special Court. This can raise an obvious dilemma for a defendant who may be impelled to engage in subtle calculations concerning the possibility of offending the court by pointing too vigorously to alleged overreaching by fellow judges or by an officer appointed by and supervised by fellow judges.").

[12] Jurisdictional Statement, at 28 (filed Feb. 1, 1988).

easily be categorized as executive, legislative or judicial may present difficulties in some cases, but this case is far from the margin. Not only does this statute strip the Executive of the core function of criminal law enforcement, but it transfers that responsibility to the Judiciary, compromising its neutrality and thrusting upon it Executive powers consistently found judicially unreviewable.

At bottom, the asserted justification for this radical restructuring of the law enforcement function is the claimed need to take away from the Executive the power to enforce the law as to a class of Executive Branch officials in order to protect against potential abuses of Executive power. But "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *INS v. Chadha*, 462 U.S. 919, 959 (1983).

II. The Constitutional Issue Is Ripe For Adjudication.

Independent counsel's argument that this constitutional claim is not ripe for adjudication is neither timely nor meritorious. As the Court of Appeals held, the ripeness claim is non-jurisdictional and therefore was waived by independent counsel's failure to raise it in the District Court. *In re Sealed Case*, slip op. at 9 n.6. In any event, independent counsel's ripeness argument is foreclosed by this Court's decision in *United States v. Ryan*, 402 U.S. 530 (1971)—a decision that "could scarcely be clearer or more on point." *In re Sealed Case*, 827 F.2d 776, 778 (D.C. Cir. 1987) Each court that has been asked to adjudicate a challenge to a grand jury subpoena based on the authority or bias of the prosecutor conducting the investigation has reached the merits of the challenge.[13]

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[13] *Id.* at 778-79, citing *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1369 (6th Cir. 1978); *In re Perlin*, 589 F.2d 260

Blair v. United States, 250 U.S. 273 (1919), does not conflict with these consistent holdings. *Blair* simply precludes a witness who is not a target from attacking the constitutionality of a criminal statute based on "the sheerest speculation" that the statute "would ever have a direct impact on the contemnor." *In re Sealed Case*, 827 F.2d at 779. Here, the independent counsel statute would have a direct and inescapable impact on Mr. Olson if he were forced to comply with a subpoena obtained by an institutionally unaccountable and biased prosecutor whose very existence violates Articles II and III.

CONCLUSION

Fully aware of the importance of its action, the Court of Appeals held an Act of Congress unconstitutional. Its decision reflects painstaking deliberation and analysis. Its judgment is manifestly correct and should be affirmed.

Respectfully submitted,

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(7th Cir. 1978); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); *United States v. DiGirlomo*, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975); *In re Patriarca*, 396 F. Supp. 859, 862-63 (D.R.I. 1975); *In re DiPiero*, 394 F. Supp. 1350 (E.D. 1975). *Accord, United States v. Doe*, 541 F.2d 490, 493 (5th Cir. 1976).

Supreme Court, U.S.
FILED
FEB 9 1988

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OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT

v.

THEODORE B. OLSON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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1. This case presents the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. (& Supp. III) 591-598.[1] The Act provides that a special division of an Article III court may appoint an independent counsel to

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[1] Those provisions were amended and reenacted by the Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293, which took effect on December 15, 1987. Pursuant to Section 6(b) of the 1987 Act, 101 Stat. 1307, proceedings like this one that were already pending prior to December 15, 1987, generally continue to be governed by the original independent counsel provisions, although certain limited provisions of the new law apply. The applicable new provisions are concerned with attorneys' fees, financial accounting, conflict-of-interest and financial disclosure rules applicable to independent counsels and their staffs, custody of records, and judicial review of a removal of an independent counsel from office. Neither those provisions nor other changes made by the 1987 Act fundamentally alter the constitutional issues presented in this case.

conduct certain criminal investigations and prosecutions of offenses against the United States (28 U.S.C. 593, 594). It gives the Attorney General the responsibility to make preliminary investigations and, in certain circumstances, to request appointment of an independent counsel (28 U.S.C. (& Supp. III) 591, 592); the Department of Justice is also responsible for the provision of funding to independent counsels (28 U.S.C. 594(d); see also § 2, 101 Stat. 1301 (to be codified at 28 U.S.C. 594(d)(2))). When an independent counsel is appointed to investigate a particular matter, the appointment automatically suspends the prosecutorial authority in the matter that would otherwise lie in the Department of Justice; the exercise of the Department's prosecutorial authority would be subject to the supervision of the Attorney General, who is appointed by the President and serves at his pleasure (28 U.S.C. 503, 516-519).

The President and the Department of Justice have a strong and direct interest in this case, and the Solicitor General plans to present their views as amicus curiae. The validity of the Act affects the Executive Branch as a whole and directly affects the continuing responsibilities of the Attorney General and the Department: it determines whether new requests for appointment of independent counsels are to made, whether continued funding is to be provided to independent counsels, and whether the Department is to pursue criminal investigations that would, under the Act, instead be referred to an independent counsel. Moreover, any examination of the constitutionality of the Act involves fundamental questions concerning the Constitution's allocation of authority within the federal government, questions of vital interest to the President and to the Executive Branch as a whole. Further, the independent counsel statute itself specifically contemplates that the Solicitor General may "mak[e] a presentation as amicus curiae" on issues of law raised in

cases to which an independent counsel is a party (28 U.S.C. 597(b)).

2. We agree with appellant (J.S. 29) that the Court should note probable jurisdiction to review the decision of the court of appeals (J.S. App. 1a-128a) invalidating the independent counsel provisions of the Ethics in Government Act. As appellant notes (J.S. 2), appellate jurisdiction is proper under 28 U.S.C. 1252, since the court of appeals struck down federal legislation as unconstitutional, and this civil-contempt proceeding is civil in nature (see *Shillitani* v. *United States*, 384 U.S. 364, 368 (1966); H.R. Rep. 91-1549, 91st Cong., 2d Sess. 46 (1970)). And although we believe that the court of appeals correctly invalidated the independent counsel provisions, we agree with appellant (J.S. 26) that the question of their constitutionality is "so substantial as to require plenary consideration" (Sup. Ct. R. 15.1(h)). Several independent counsels currently hold appointments under the Act[2]; the constitutionality of the Act presents a question of great importance concerning the distribution of powers among the Branches of the Government; and summary disposition would be inappropriate.[3]

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[2] We note, however, that all independent counsels have been offered, and some have accepted, parallel appointments by the Attorney General, so that their activities as prosecutors may be conducted without impediment on account of the constitutional defects of the Act. Appellant rejected such a parallel appointment. See J.S. App. 17a-18a; *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), cert. denied, No. 87-869 (Jan. 19, 1988).

[3] Appellant contends (J.S. i, 23-26) that appellees' challenge to the constitutionality of the independent counsel provisions is not "ripe." The court of appeals ruled that the challenge was ripe and that, in any event, appellant could not raise her ripeness argument, which she failed to raise in the district court (J.S. App. 9a n.6). In the court of appeals, we briefly indicated (U.S. Amicus Br. 2) that the constitu-

Although the interests of the President and the Department of Justice would justify intervention, we have refrained from moving to intervene.[4] We do, however, propose to participate fully in this case as amicus (see 28 U.S.C. 597(b)). We therefore address two procedural matters raised by appellant. First, we are prepared to meet any briefing and argument schedule this Court sets, including that proposed by appellant (Mot. to Expedite 6). Second, we believe that the case will likely warrant two hours of oral argument, though that matter need not be resolved now. Cf. *id.* at 6-7 (proposing one and one-half hours for oral argument, but noting that more time may be necessary if counsel for non-parties such as the Solicitor General are granted argument time). At an appropriate

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tional challenge appeared to be ripe. We will address the ripeness issues further if this Court notes probable jurisdiction. At this stage, we simply note that those issues should not stand in the way of full briefing and argument on the court of appeals' invalidation of the independent counsel provisions. To render such briefing and argument unnecessary, this Court would have to reverse summarily both of the court of appeals' ripeness rulings. Appellant does not suggest that course, and we agree that the ripeness questions would benefit from plenary consideration along with the constitutional issues.

[4] Section 597(b) makes clear the Solicitor General's right to "mak[e] a presentation as amicus curiae," but it does not restrict the right to intervene in an appropriate case. The separate and substantial interests of the President and the Department are of course most apparent in a case presenting a challenge to the Act itself. Section 597(b), although plainly applicable here, was presumably intended to provide for participation in cases brought under the Act that raise, *e.g.*, criminal procedure issues in which the Justice Department would have an interest, most often parallel to that of the independent counsel.

time, after further consultation with the parties to this case, we plan to seek leave to participate in the oral argument so that we may orally "mak[e] a presentation" (28 U.S.C. 597(b)) to the Court.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60280

MOTION FILED
FEB 18 1988

No. 87-1279

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant

THEODORE B. OLSON, EDWARD C. SCHMULTS and CAROL E. DINKINS,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WHITNEY NORTH SEYMOUR, JR. INDEPENDENT COUNSEL, IN SUPPORT OF JURISDICTIONAL STATEMENT

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No. 87-1279

IN THE
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October Term, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant

THEODORE B. OLSON, EDWARD C.
SCHMULTS and CAROL E. DINKINS,
Appellees

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

MOTION OF WHITNEY NORTH SEYMOUR, JR.,
INDEPENDENT COUNSEL,
FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Whitney North Seymour, Jr., Independent Counsel, respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorneys for all parties has been obtained, except the consent of the attorney for appellee Olson, which was

requested, but refused.*/

The interest of Independent Counsel, Whitney North Seymour, Jr., in this case arises from the fact that he was appointed Independent Counsel by the Special Division of the United States Court of Appeals on May 29, 1986, for purposes of investigating, and if warranted, prosecuting Michael K. Deaver, former White House Deputy Chief of Staff and Assistant to the President of the United States. Like appellant Morrison, this order is the sole basis for Independent Counsel's appointment, an offer of a "parallel

*/ Counsel for appellee Olson consents to the filing of an amicus curiae brief by Whitney North Seymour, Jr., on the merits, in the event the Court notes probable jurisdiction. Consent has been refused to the filing of the attached brief amicus curiae in support of the jurisdictional statement solely on the ground that expedited review of this matter reduces appellee's opportunity to respond.

appointment" as a Justice Department employee having been made after the investigative phase was completed, and having been declined.

Pursuant to the Special Division's order, Independent Counsel's investigation commenced in May 1986, and led to the filing by a grand jury on March 18, 1987, of a five-count indictment alleging that Deaver had committed perjury, in violation of 18 U.S.C. §§1621, 1623, in testimony before the grand jury and before a subcommittee of the House of Representatives. Trial of this indictment commenced on October 19, 1987 before the Honorable Thomas Penfield Jackson, United States District Judge, and a jury. On December 16, 1987, the jury returned verdicts of guilty on three counts of the indictment, and acquitted Deaver on two counts.

Prior to sentencing in the District Court, the decision in In Re: Sealed Case, Misc. Nos. 87-5261, 87-5264, and 87-5265 (D.C. Cir. Jan. 22, 1988), was announced. Deaver immediately moved the District Court to vacate the jury verdict and dismiss the indictment, which Independent Counsel opposed. The District Court then, sua sponte, stayed all proceedings in the case pending review of the In Re: Sealed Case decision.

Independent Counsel seeks leave to present the attached brief amicus curiae in order to:

(1) emphasize the urgency of a resolution of the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§49, 591-98, particularly in view of the pending criminal case, in which an accused's guilt has been established by a jury verdict, but in which no sentence has been imposed, no judgment has been entered, and further proceedings have been stayed;

(2) to support the constitutionality of these provisions and thereby add to the completeness of the defense of the challenged statute; and

(3) to respond to the erroneous statements in the decision under review concerning the operation and functioning of an independent counsel.

Respecfully submitted,

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February 18, 1988

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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF WHITNEY NORTH SEYMOUR, JR. AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF AMICUS CURIAE

Amicus curiae Whitney North Seymour, Jr., was appointed Independent Counsel on May 29, 1986, pursuant to 28 U.S.C. §592 (c)(1), for purposes of investigating, and, if warranted, prosecuting Michael K. Deaver, former White House Deputy Chief

of Staff and Assistant to the President of the United States. This appointment was made in response to widespread public concern over whether Mr. Deaver's conduct, following his departure from the White House to found a Washington, D.C. lobbying firm, violated the Ethics in Government Act, 18 U.S.C. §207.

This concern led five members of the United States Senate to write to the Attorney General, on April 23, 1986, requesting the appointment of an independent counsel. 28 U.S.C. §595(e). Two days later, on April 25, 1986, the Office of Government Ethics wrote the Attorney General advising him that its own investigation suggested that Deaver had violated the law. On May 10, 1986, the Government Accounting Office expressed its belief that Deaver's activities might have been unlawful. On April 28, 1986,

through his counsel, Deaver himself requested the Attorney General to appoint independent counsel.

On May 22, 1986, pursuant to 28 U.S.C. §592(c)(1), Deputy Attorney General D. Lowell Jensen moved a Division of the United States Court of Appeals for the District of Columbia Circuit for the appointment of an independent counsel in the Deaver matter. The application was submitted by the Deputy Attorney General because the Attorney General had recused himself from the matter. See 28 U.S.C. §591(c). The application set forth the recommended subject matter of independent counsel's jurisdiction, and on May 29, 1986, the Special Division appointed Whitney North Seymour, Jr., as independent counsel in an order conferring upon him jurisdiction tracking the Deputy

Attorney General's request.[1]

Following an unsuccessful pre-indictment challenge by Deaver to the constitutionality of the independent counsel statute,[2] the grand jury returned an indictment on March 18, 1987, in five counts, which charged Deaver with perjury, in violation of 18 U.S.C. §§1621, 1623.[3]

[1] In March 1987, Independent Counsel was offered a "parallel appointment" as a Justice Department employee. See 52 Fed. Reg. 7270 (1987). The offer was declined.

[2] Deaver v. Seymour, 656 F. Supp. 900, 902 n.3 (D.D.C. 1987), aff'd, 822 F.2d 66 (D.C. Cir. 1987), stay denied, 55 U.S.L.W. §641 (U.S. March 18, 1987).

[3] Three counts of the indictment alleged that Deaver perjured himself during his voluntary appearance before the grand jury. Two counts alleged that Deaver committed perjury when he testified on May 16, 1986, before the Subcommittee on Oversight and Investigations of the House Committee on Commerce and Energy. On August 12, 1986, pursuant to a unanimous determination of the Subcommittee, its chairman, Rep. John D. Dingell referred to Independent Counsel the question whether Deaver had committed perjury before the subcommittee.

Trial of this indictment commenced before the Honorable Thomas Penfield Jackson, United States District Judge, and a jury on October 19, 1987. On December 16, 1987, the jury returned a verdict of guilt on three counts of the indictment, and acquitted Deaver on two counts.

While awaiting sentencing, which was scheduled for February 25, 1988, a panel of the United States Court of Appeals for the District of Columbia Circuit held the independent counsel provisions of the Ethics in Government Act unconstitutional. In Re: Sealed Case, Misc. Nos. 87-5261, 87-5264 and 87-5265 (D.C. Cir. January 22, 1988).

On the authority of that decision, on January 22, 1988, Deaver moved in the District Court to vacate the verdicts of guilt and for dismissal of his convic-

tion. Independent Counsel opposed the motion, and on February 2, 1988, sua sponte, Judge Jackson stayed all proceedings in the case pending review of the In Re: Sealed Case decision.

Independent Counsel Seymour submits this brief in order to emphasize the urgency of the need for review of the In Re: Sealed Case decision, and resolution of the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§49, 591-98. The urgency is heightened by the current posture of the Deaver case in the District Court, where a jury verdict of guilt has been returned, yet no sentence has been imposed, no judgment of conviction has been entered, and all proceedings have been stayed.

Second, this brief is submitted to enhance the completeness of the defense

of the challenged statute.

Third, this brief responds to the erroneous statements contained in the panel decision concerning the operation and functions of an independent counsel.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL 4/

The decision of the panel of the Court of Appeals in this case, issued over strong dissent, is the first judicial decision to hold the independent counsel provisions of the Ethics in Government Act unconstitutional, after an

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4/ Independent Counsel Seymour agrees with petitioner's request that this Court regard this case as a direct appeal, pursuant to 28 U.S.C. §1252. Should the Court decide, however, that 28 U.S.C. §1252 is not applicable, Independent Counsel Seymour submits that the issues presented herein are of exceptional importance and justify this Court's exercise of its certiorari jurisdiction and expedited consideration on the merits.

unbroken line of decisions upholding their constitutionality.[5/]

The panel decision is inconsistent with well-established precedents of this Court. Therefore, review is required, and, indeed, is urgently needed to resolve the constitutionality of the institution of independent counsel.

Point One

THE INDEPENDENT COUNSEL STATUTE IS A RESTRAINED AND CONSTITUTIONALLY CORRECT RESPONSE TO THE PROBLEM OF CONFLICT OF INTEREST IN THE EXECUTIVE BRANCH

The independent counsel provisions arose from a legislative determination,

5/ See In re Olson, 818 F.2d 34, 43 (D.C. Cir., Div. for Purpose of Appointing Independent Counsels, 1987); North v. Walsh, 656 F. Supp. 414, 420 n.9 (D.D.C. 1987), aff'd on other grounds, No. 87-5058 (D.C. Cir. Oct. 1, 1987), petition for cert. pending, No. 87-1094; Deaver v. Seymour, 656 F. Supp. 900, 902 n.3 (D.D.C. 1987), aff'd on other grounds, 822 F.2d 66 (D.C. Cir. 1987), stay denied, 55 U.S.L.W. 3641 (U.S. March 18, 1987); Banzhaf v. Smith, 588 F. Supp. 1498, 1504-08 (D.D.C.), vacated on other grounds, 737 F.2d 1167 (D.C. Cir. 1984) (en banc).

following "Watergate," that there was a critical "need for a special prosecutor to handle cases where the Attorney General has a conflict of interest." H.R. Rep. No. 1307, 95th Cong., 2d Sess. (1978) (emphasis added). Legislation aimed at establishing a special prosecutor was actively considered in the 93rd, 94th, and 95th Congresses, before the Act was passed. During that period, the firm view of Congress was "not... whether a special prosecutor might at some time be appropriate. Rather the issue [was] what sort of process should be relied upon to put a special prosecutor into place whenever it is necessary to have one." Id. Moreover, the Act's history demonstrates that the constitutional considerations at issue now were extensively and carefully considered

during the legislative process, and that it was clear then,[6] as it is now,[7] that

[6] The following distinguished constitutional law scholars expressed support for the constitutionality of the Ethics in Government Act prior to its passage: Professors Paul Freund, Archibald Cox, Philip B. Kurland, Raoul Berger, and Laurence Tribe. See Hearings on Special Prosecutor before the Senate Committee on the Judiciary, 93d Cong., 1st Sess. (1973). These scholars filed an amicus brief in support of the statute in the proceedings below. See also Berger, "The Prosecutor," N.Y. Times, Nov. 7, 1983 at 47 col.5 ("[t]he power of appointment and the separation of powers were not designed to obstruct justice"). Moreover, the American Bar Association and the Association of the Bar of the City of New York supported the constitutionality of the Act, following careful study by special committees. See statement of Herbert S. Miller on behalf of the ABA before the Senate Subcommittee on Governmental Affairs on the subject of the Special Prosecutor Provision of the Ethics in Government Act (May 20, 1981); see also "The Special Prosecutor Provision of the Ethics in Government Act of 1978," A Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York (May 1981).

[7] See Briefs of Amici Curiae filed in the Court of Appeals in support of Independent Counsel Morrison's position in this case. Administrations of both political parties have acknowledged the constitutional validity of the independent counsel provisions, in congressional testimony and through use of the

the great weight of authority supports the constitutionality of the Act.

The panel decision holds that the statute in question profoundly alters the structure of our constitutional form of government. However, on reflection, it is clear that the independent counsel provisions of the statute are exceedingly

(cont.)

statute. The Justice Department never opposed the statute's constitutionality until the appeal below. See also Testimony of Assistant Attorney General John Harmon before Senate Committee on Governmental Affairs on S. 555, 95th Cong., 1st Sess. (1977) at 16 (judicial appointment of a special prosecutor is constitutional in view of extraordinary circumstances); Testimony of Associate Attorney General Rudolph W. Guiliani before Senate Subcommittee on Oversight of Government Management on S. 2059, 97th Cong., 2d Sess. (1982) at 17 (while Department has serious concern about constitutionality of present law, these are substantially ameliorated by pending bill). As the Supreme Court has noted, a claim of interference with a branch of government is less viable if that branch has expressed its agreement with the particular law. Nixon v. Administrator of General Services, 433 U.S. 425, 449 (1977).

narrow in their scope, and seek to address a very specialized range of problems. They apply only in situations involving specified high government officials, 28 U.S.C. §591(b), or in situations in which the Attorney General determines that neither he nor the Justice Department can investigate because of the potential for a "personal, financial, or political conflict of interest." 28 U.S.C. §591(c).

The issue of conflict is not merely theoretical. In the Deaver matter, the application for appointment of independent counsel was submitted to the Special Division by the Deputy Attorney General expressly because the Attorney General had recused himself. Hence, the statute only comes into play when there is a genuine risk that an actual or potential conflict of interest disables the

Attorney General and the Justice Department from going forward. As we develop more fully below, these provisions are consistent with the constitutional principles announced in the decisions of this Court, and they by no means constitute the sharp break with history and precedent that the panel decision suggests they do.

Point Two

THE FUNCTIONING OF INDEPENDENT COUNSEL DOES NOT INVADE EXECUTIVE AUTHORITY OR JEOPARDIZE INDIVIDUAL LIBERTY

In addition to finding specific constitutional defects stemming from judicial appointment and restrictions on executive removal power,[8/] the panel majority held that the independent

[8/] Because we believe the specific issues concerning the appointment and removal power are adequately briefed by the parties and other amici, we confine our brief to the issues particularly within the competence of the first Independent Counsel to obtain an indictment and conviction after trial.

counsel statute "as a whole...so deeply invades the President's executive responsibilities and so jeopardizes individual liberty as to be unconstitutional." (Slip Op. 74). This erroneous conclusion is based on a misreading of the statute and unsupported speculation about the actual functioning of an independent counsel.

A. Executive Prerogatives Are Not Invaded By The Independent Counsel Statute

Under the Act, the Special Division has authority to appoint an independent counsel in two ways. First, if the Attorney General has received information concerning one or more persons within the specified category of high-ranking officials, and the information indicates a possible criminal violation, the Attorney General has no obligation under the statute unless he determines, based on the specificity and credibility of the information, that further investigation is

appropriate. Upon completion of any such preliminary investigation, the Attorney General is again under no obligation to apply for the appointment of independent counsel, unless he "finds reasonable grounds to believe that further investigation or prosecution is warranted." 28 U.S.C. §592(c).

The second path toward appointment of independent counsel is entirely permissive. It comes into play only if the Attorney General determines that investigation by the Department of Justice may result in a conflict of interest, and the Attorney General receives information of a criminal violation sufficient to constitute grounds to investigate. If these preconditions are met, then the Attorney General "may conduct an investigation and apply for an independent counsel." Id. §591(c) (emphasis added).

Under either of these procedures, the Attorney General retains exclusive control over the decision to apply to the Court for appointment of independent counsel. The statute unequivocally states, with respect to the first alternative, that "[i]f the Attorney General ...finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, ... the court shall have no power to appoint independent counsel." Id., §592(b)(1) (emphasis added). The Attorney General's decision not to apply for independent counsel is unreviewable. Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (en banc); Nathan v. Smith, 737 F.2d 1069, 1077-82 (D.C. Cir. 1984) (Bork, J., concurring). Moreover, even if independent counsel is appointed, the

Attorney General retains authority to limit the counsel's jurisdiction, since the court is powerless to enlarge the counsel's jurisdiction over the Attorney General's contrary decision. In re Theodore Olson, 818 F.2d 34, at 47-48.

Since the second procedure for appointment of independent counsel is committed to the discretion of the Attorney General, it presents not even an arguable instance of diminution of executive control over the power to prosecute.

Furthermore, the 1982 amendments to the statute make clear that Congress expects the Attorney General's initial determination of whether further investigation or prosecution is warranted to be influenced by the "legitimate exercise of discretion and the [Justice] Department's established policies of law enforcement." S. Rep. No. 496, 97th Cong., 2d Sess. 14

(1982). Thus, the statute does not seek to control the Attorney General's decision, nor limit his traditional exercise of discretionary decision-making. Indeed, it specifically grants the Attorney General the unreviewable authority to determine, according to the Justice Department's customary standards, whether appointment of an independent counsel is warranted. A statutory scheme such as this cannot fairly be regarded as an unconstitutional invasion of the executive power over prosecutorial decision-making.

Under the statute, it is the Attorney General who makes the policy decision whether a prosecution should take place (if supported by the facts) at the time he decides to file his application with the Special Division. 28 U.S.C. §592(b)

(1)[9/] If he decides for policy reasons that he will not authorize such a prosecution, his option is not to file any application with the Special Division and then explain his reasons to the community. Under the statute, that decision is unreviewable. (Contrast Maj. Op. at p.72.) In that respect, his policy-making function is no different than it

[9/] By "policy decision," we mean the "legitimate exercise of discretion and the [Justice] Department's established policies of law enforcement," which the statute contemplates will influence this decision.

In the Deaver matter, the application by the Deputy Attorney General expressly directs that the Independent Counsel shall prosecute any federal law violations supported by the evidence.

> It is recommended that the independent counsel's jurisdiction include investigative and prosecutive authority over the specific allegations described in Part II above. In addition, it is recommended that the independent counsel's jurisdiction include investigative and prosecutive authority over all other allegations presented in the three referrals, and over any related matters developed in the course of the independent counsel's investigation.

(Appl. p.6-7) (Emphasis added)

would be if he delegated only investigative responsibility to independent counsel, and reserved decision on whether to authorize prosecution until the investigation had been completed.[10/] The Independent Counsel's function as far as prosecution is concerned could be described as essentially a ministerial one: to review the legally-admissible evidence to determine if it will support a conviction, and, if so, to proceed. The statute expressly directs the Independent Counsel to follow the Department of Justice guidelines in performing this and

10/ When the Department of Justice refers cases to individual United States Attorneys prior to completion of the investigative phase, the policy question of whether to prosecute if the facts warrant is made at that point. The U.S. Attorney ordinarily does not report back for further instructions.

other functions. 28 U.S.C. §594(b). He or she is not permitted to operate capriciously or arbitrarily on his own. (Contrast Maj. Op. at p.72.)[11/]

The majority opinion erroneously asserts that under the statute the Attorney General has no effective power "to define, circumscribe, or supervise" the duties of the Independent Counsel. (Maj. Op. p.19.) In fact, the statutory directive to follow Departmental policies gives the Attorney General exactly the same power over the execution of the duties of the Independent Counsel that he has over every other prosecutor in the Department. The Attorney General sets

11/ The United States Department of Justice's "Principles of Federal Prosecution" are printed in booklet form and available to the public. In the Deaver matter, copies were distributed to every member of the legal staff in the early stages of the investigation.

the ground rules, and the prosecutors carry them out. When the Attorney General asks the Special Division to appoint Independent Counsel to prosecute, he delegates sufficient discretion (within the guidelines) to permit the Independent Counsel to carry out his or her assigned duties. He does not yield up the policy decision on whether to prosecute if sufficient evidence is developed -- that decision is made when the Attorney General decides to file the application for appointment of Independent Counsel, because at that point he has made the statutory determination that "further investigation or prosecution is warranted." 28 U.S.C. §592(c). Plainly, the policy-making phase is long past at the point the indictment is filed by the appointee carrying out the Attorney General's original decision. What remains is merely

the faithful discharge of an assigned duty.

While it is true that once appointed, independent counsel operates without day-to-day supervision of the Attorney General, the panel majority misunderstands our history when it asserts that the principle of separated powers cannot tolerate a federal prosecutor's limited independence from the Attorney General.[12/] The Judiciary Act of 1789, Ch.20, 1 Stat. 73, provided for the appointment

[12/] Of course, the "critical factor" limiting independent counsel's independence is, as this Court acknowledged in Bowsher v. Synar, 106 S. Ct. at 3188, the power to remove, which remains with the Attorney General. Inexplicably, the panel majority concluded that "in practical terms," the independent counsel's superior is the Special Division. This is simply a false and unsupported assertion. The "practical terms" of the functioning of amicus as independent counsel has involved no judicial supervision or interference whatsoever.

of both the Attorney General and an attorney in each federal district "to prosecute...all delinquents for [federal] crimes and offenses." The Attorney General, however, "had no formal control over the conduct of the local federal law enforcement officers." 3 Encyclopedia of Crime and Justice 1291 (S. Kadish, ed. 1983). Although proposals to give the Attorney General authority over "federal district attorneys," as they were then known, were introduced in Congress as early as 1791, legislation to achieve this objective was not enacted for another seventy years or more. Hence, "it was not until after Reconstruction and the creation of the Department of Justice in 1870 that the various prosecutors came under any meaningful national supervision." Id. See generally Cummings & McFarland, Federal Justice:

Chapters in the History of Justice and the Federal Executive (1937); Huston, The Department of Justice (1967); Schwartz, "Federal Criminal Jurisdiction and Prosecutor's Discretion," 13 Law & Contemporary Problems 64-87 (1948).

Viewed against this historical backdrop, the Attorney General actually exercises greater control over independent counsel, by virtue of his power over appointment, removal and the definition of jurisdiction, than attorneys general exercised over federal prosecutors for the first half of our republic's history. It is therefore difficult to accept the panel majority's view that the principle of separated powers cannot tolerate independent counsel's limited freedom from direct control by the Attorney General,

when the Framers tolerated a far greater degree of such independence.[13/]

B. Independent Counsel's Limited Independence Does Not Jeopardize Individual Liberties

Apparently on the basis of a comment made by counsel for one of the appellees at oral argument in the court of appeals, the panel majority was prompted to speculate that "independence from presidential

13/ An examination of the present-day relationship actually prevailing between the Attorney General and the United States Attorneys throughout the country similarly reveals considerable independence. "Whether because of history, the selection process, or sheer volume of business, the United States Attorney's daily operations remain largely free of control by officials in Washington, D.C... Although the department may announce broad priorities for federal law enforcement, each United States Attorney ultimately makes his own decisions about which cases to pursue and the resources to be allocated to particular enforcement efforts." 3 Encyclopedia of Crime and Justice, supra, at 1292 (emphasis added). See also Principles of Federal Prosecution, at 8 (Department of Justice 1980) ("Individual United States Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance."

and Justice Department supervision and guidance" jeopardizes individual liberty. (Slip Op. 70, 74).[14/] The threat to liberty, according to the panel majority, stems from two sources: (1) independent counsel's purportedly "unique incentives to seek an indictment," rather than decline prosecution, and (2) independent counsel's purported isolation from the "accumulated lore and wisdom" of career Justice Department prosecutors, which, it is argued, ordinarily operate as restraints on the decision to prosecute. (Slip Op. 70-72). Neither of these purported sources of unfairness are more

14/ Indeed, in this and similar passages (Slip Op. 73), the panel majority suggests that the target of a criminal investigation is constitutionally entitled to an institutional arrangement which will permit the very political influence over law enforcement that motivated passage of the independent counsel legislation, an attitude which could be viewed as a recipe for political corruption.

than an imagined threat to liberty, much less a source of constitutional infirmity.

The record of past independent counsels simply refutes the panel majority's fear that independent counsel is precon ditioned to prosecute. Until the Deaver investigation, every prior independent counsel terminated his investigation with a declination of prosecution, on grounds of evidentiary weakness or otherwise.[15/] Contrary to the panel majority's speculation that the nature of prosecutorial decision-making in a high-visibility,

[15/] Four distinguished attorneys (Arthur H. Christy, Gerald J. Gallinghouse, Leon Silverman, and Jacob A. Stein) served as Independent Counsel prior to the appointment in the instant case of James McKay, and, upon his withdrawal due to potential conflict, Alexia Morrison. Each of the prior investigations resulted in a decision not to go forward with a criminal prosecution.

single case context intolerably encourages prosecution, the opposite of this conclusion could just as well be drawn. A prosecutor who "administer[s] the criminal law across a wide population" may be in a much better position to go forward in a marginal case, or one involving evidentiary or other weaknesses, precisely because "the success of the office" will not be measured by that one case. (Slip Op. 70-71). Independent counsel, on the other hand, is a prosecutor whose mission is essentially "to investigate and prosecute a single individual." Id. Since the effectiveness of the counsel's "office itself, in the public's eyes, at least, must turn to some extent upon whether indictment and conviction are obtained," id., there is actually a disincentive to going forward in all but the clearest, most certain cases. In other

words, the high-visibility, single case context instills caution, even reluctance, rather than the undue eagerness suggested by the panel majority.

Secondly, the panel majority's assumption that independent counsel is isolated from the reservoir of practical experience and long-range institutional perspective of the Justice Department is simply false. As we have already shown, supra, the initial decisions concerning appointment and jurisdiction are effectively within tne Attorney General's control. Moreover, development of the factual record relevant to the assertion of lack of experience and perspective would reveal that independent counsel's offices are extensively staffed by former Justice Department employees who cut their teeth as lawyers in the institutional setting the panel majority regards

as so important to fairness in prosecutorial decision-making. Moreover, this factual record would also show, in the Deaver case, extensive and valuable assistance provided independent counsel by the Justice Department and the United States Attorney's Office for the District of Columbia.

Finally, it is difficult to perceive the unconstitutional unfairness that inures to persons "who find themselves the target of independent counsel's attentions,"[16/] since such persons are protected by all of the constitutional and statutory limits on the power to investigate and prosecute that apply in any criminal case.

In sum, the panel majority's conclu-

16/ We cannot help but note in passing that this does not apply to Mr. Deaver, who urged the appointment of independent counsel and voluntarily testified before the grand jury, where he perjured himself, as a trial jury has found beyond reasonable doubt.

sion that the functioning of an independent counsel unconstitutionally threatens individual liberty is unpersuasive. Even if the "incentive to prosecute" or isolation from restraining institutional influences existed, which we submit they do not, these purported deficiencies in the statutory scheme might indicate its undesirability as policy: they would hardly rise to the level of depriving Congress of its lawful power to enact the legislation.

Conclusion

For all of the foregoing reasons, probable jurisdiction should be noted (or, in the alternative, a writ of certiorari should issue), and the case should

be set down for expedited consideration and determination on the merits.

Respectfully submitted,

Whitney North Seymour, Jr.
Independent Counsel

Marc J. Gottridge
George P. Hritz
Walter P. Loughlin
Associate Independent Counsel
U.S. Courthouse
Room 6400
Washington, D.C. 20001
(202) 371-9720

February 18, 1988

No. 87-1279

FILED

MAR 9 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON,
EDWARD C. SCHMULTS, and
CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals For The District of Columbia Circuit

JOINT APPENDIX

ALEXIA MORRISON
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JURISDICTIONAL STATEMENT FILED FEBRUARY 1, 1988
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1988

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES[1]

United States District Court for the District of Columbia

In re Sealed Case, Misc. No. 87-0197

June 1, 1987—Motion by Edward C. Schmults to Quash Grand Jury Subpoenas; Exhibits (5) (March 3, 1988).

June 9, 1987—Opposition by Independent Counsel to Motion to Seal and to Motion to Quash Grand Jury Subpoenas; Exhibits (4) (March 3, 1988).

July 20, 1987—Order denying Motion to Quash. Robinson, C.J. (March 3, 1988).

July 20, 1987—Memorandum Opinion.

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[1] The relevant docket entries on this list are for the most part abstracted from the dockets of the courts below. Because those dockets are in two respects potentially confusing, the parties have in two instances departed from that format.

(a) The dockets of both courts below are incomplete and do not contain some relevant entries. Where that is the case, the parties have added to this list items which do not actually appear as entries in the dockets of the courts below but which the parties agree should have appeared there and properly reflect the record. These additional items are indicated by an asterisk in the margin next to them.

(b) Between June 1 and August 20, 1987, approximately forty-five (45) documents were filed under seal in the District Court. Until January 1, 1988, it was apparently the practice of the Clerk of the District Court to make no docket entry reflecting the filing of a document under seal. Portions of the District Court record were unsealed on three dates, January 19, February 1, and March 3, 1988, and it was not until those dates that the Clerk actually made docket entries reflecting the earlier filing of sealed documents. Such entries do not appear, however, in chronological order in the dockets but rather in a group entry under the date of unsealing. In order to eliminate any confusion, the parties have reordered such entries, placing them in chronological order of filing but indicating in parentheses at the end of each such entry the date on which the document was unsealed and entered in the docket.

August 18, 1987—Order finding Edward C. Schmults in contempt; confining Edward C. Schmults for the life of the grand jury or until he complies with the order of July 20, 1987; staying order pending appeal, provided a notice of appeal filed within twenty-four hours. Hogan, J. (March 3, 1988).

In re Sealed Case, Misc. No. 87-0205

*June 9, 1987—Motion by Theodore B. Olson to Quash Grand Jury Subpoenas.

June 17, 1987—Opposition by Independent Counsel to Motion to Quash Grand Jury Subpoena; Exhibits (2) (March 3, 1988).

*June 24, 1987—Reply by Theodore B. Olson to Independent Counsel's Opposition to Motion to Quash.

July 20, 1987—Memorandum and Order denying Motion to Quash Grand Jury Subpoenas. Robinson, C.J. (March 3, 1988).

July 24, 1987—Motion by Theodore B. Olson for Reconsideration of Sealed Memorandum and Order (March 3, 1988).

July 31, 1987—Opposition by Independent Counsel to Motion for Reconsideration of Sealed Memorandum and Order (March 3, 1988).

July 31, 1987—Reply by Theodore B. Olson to Opposition of Independent Counsel to Motion for Reconsideration (March 3, 1988).

August 4, 1987—Order denying Motion for Reconsideration of Sealed Memorandum and Order; directing movant to forthwith comply with subpoena. Robinson, C.J. (March 3, 1988).

August 19, 1987—Order finding Theodore B. Olson in civil contempt; confining Theodore B. Olson for the life of the grand jury or until he complies with the Court's order of August 4, 1987; staying order pending appeal, provided a notice of appeal be filed within twenty-four hours. Hogan J. (March 3, 1988).

December 23, 1987—Motion by Independent Counsel to Modify Contempt Order; Exhibit (1) (January 19, 1988).

January 7, 1988—Opposition by Theodore B. Olson to Motion to Modify Contempt Order[2] (January 19, 1988).

January 11, 1988—Reply by Independent Counsel to Opposition to Motion to Modify Contempt Order (January 19, 1988).

January 12, 1988—Response by Mr. Olson to Independent Counsel's Reply to Opposition to Motion to Modify Contempt Order (January 19, 1988).

January 26, 1988—Order denying Motion to Modify Contempt Order. Robinson, C.J.

In re Sealed Case, Misc. No. 87-0215

June 15, 1987—Motion by Petitioner Carol E. Dinkins to Seal Grand Jury Records and Motion to Quash Grand Jury Subpoenas; attachment (March 3, 1988).

June 26, 1987—Opposition by Independent Counsel to Motion to Seal; Opposition by Independent Counsel to Motion to Quash; Exhibits (3) (March 3, 1988).

July 20, 1987—Order denying Motion to Quash Grand Jury Subpoena. Robinson, C.J.

July 20, 1987—Memorandum Opinion.

August 18, 1987—Order finding Carol E. Dinkins in contempt; confining Carol E. Dinkins for the life of the grand jury or until she complies with the Court Order of July 20, 1987; staying order pending appeal, provided a notice of appeal filed within twenty-four hours. Hogan, J. (March 3, 1988).

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[2] In the District Court docket, this entry appears incorrectly as "Opposition by Independent Counsel to motion to modify contempt order." In order to avoid any confusion, the parties have corrected this entry.

United States Court of Appeals for the District of Columbia Circuit, In re Sealed Case, No. 87-5261

August 19, 1987—Copy of notice of appeal and docket entries from Clerk, D.C. Under seal in vault.

August 31, 1987—Joint Appendix—under seal in vault.

August 31, 1987—Appellants' in 87-5261 and 5265 Envelope—under seal in vault.

August 31, 1987—Appellants' in 87-5261 and 5265 Brief.

August 31, 1987—Appellants' in 87-5261 and 5265 Exhibits to Brief.

August 31, 1987—Joint Appendix.

*August 31, 1987—Brief of Amicus Curiae United States.

September 8, 1987—Appellee's submission of material—under seal in vault.

September 8, 1987—Appellee's Brief and Appendix.

September 15, 1987—Reply Brief for Appellants—filed per above order.

September 16, 1987—Argued before Ruth B. Ginsburg, Silberman and Williams, C.J.'s.

January 22, 1988—Opinion for the Court filed by Circuit Judge Silberman.

January 22, 1988—Dissenting Opinion filed by Circuit Judge Ruth B. Ginsburg.

January 22, 1988—Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby reversed, in accordance with the Opinion for the Court filed herein this date.

January 22, 1988—Mandate Order.

January 26, 1988—Appellee's Emergency Motion to Stay Issuance of Mandate.

January 26, 1988—Appellee's Motion for Expeditious Consideration.

January 29, 1988—Appellant's (Olson) Response to Emergency Motion.

January 29, 1988—Appellee's Reply to Response to Emergency Motion.

February 1, 1988—Per Curiam order that to allow appellee to pursue whatever rights she may have to seek further review of this court's decision, the mandates of this court shall be stayed for 30 days from the date of this order (see order for details) and that the stay of mandates requested by appellee and granted by this court is conditioned upon appellee not exercising during the pendency of the stay and unless the Supreme Court otherwire directs any authority purportedly conferred by 28 U.S.C. 591-598, with the exception of the acts directly incident to pursuing the right to appeal set forth in 28 U.S.C. 594(a)(3) and that appellee's request for modification of conditions of stay of confinement is denied. Ruth B. Ginsburg, Silberman and Williams, C.J.'s.

February 1, 1988—Appellant's Notice to the Supreme Court of the United States of Appeal.

In re Sealed Case, No. 87-5264

August 19, 1987—Copy of notice of appeal and docket entries from Clerk, D.C. Under seal in vault.

August 31, 1987—Joint Appendix—under seal in vault.

August 31, 1987—Joint Appendix.

August 31, 1987—Appellant's in 87-5264 sealed material—under seal in vault.

*August 31, 1987—Brief of Amicus Curiae United States.

September 8, 1987—Appellee's submission of material—under seal in vault.

September 8, 1987—Appellee's Brief.

September 8, 1987—Appellee's Exhibits to Brief.

September 11, 1987—Appellant's (in 87-5264) Reply Brief.

September 11, 1987—Appellant's documents filed under seal—under seal in vault.

September 15, 1987—Reply Brief for Appellants—filed per above order.

September 16, 1987—Argued before Ruth B. Ginsburg, Silberman and Williams, C.J.'s.

January 22, 1988—Opinion for the Court filed by Circuit Judge Silberman.

January 22, 1988—Dissenting Opinion filed by Circuit Judge Ruth B. Ginsburg.

January 22, 1988—Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby reversed, in accordance with the Opinion for the Court filed herein this date.

January 22, 1988—Mandate Order.

January 26, 1988—Appellee's Emergency Motion to Stay Issuance of Mandate.

January 26, 1988—Appellee's Motion for Expeditious Consideration.

January 29, 1988—Appellant's (Olson) Response to Emergency Motion.

January 29, 1988—Appellee's Reply to Response to Emergency Motion.

February 1, 1988—Per Curiam order that to allow appellee to pursue whatever rights she may have to seek further review of this court's decision, the mandates of this court shall be stayed for 30 days from the date of this order (see order for details) and

that the stay of mandates requested by appellee and granted by this court is conditioned upon appellee not exercising during the pendency of the stay and unless the Supreme Court otherwise directs any authority purportedly conferred by 28 U.S.C. 591-598, with the exception of the acts directly incident to pursuing the right to appeal set forth in 28 U.S.C. 594(a)(3) and that appellee's request for modification of conditions of stay of confinement is denied. Ruth B. Ginsburg, Silberman and Williams, C.J.'s.

February 1, 1988—Appellant's Notice of Appeal to the Supreme Court of the United States.

In re Sealed Case, No. 87-5265

August 19, 1987—Copy of notice of appeal and docket entries from Clerk, D.C. Under seal in vault.

August 31, 1987—Joint Appendix—under seal in vault.

August 31, 1987—Appellants' in 87-5261 and 5265 Envelope—under seal in vault.

August 31, 1987—Appellants' in 87-5261 and 5265 Brief—under seal in vault.

August 31, 1987—Appellants' in 87-5261 and 5265 Exhibits to Brief—under seal in vault.

August 31, 1987—Joint Appendix.

*August 31, 1987—Brief of Amicus Curiae United States.

September 8, 1987—Appellee's submission of material—under seal in vault.

September 8, 1987—Appellee's Brief and Appendix.

September 15, 1987—Reply Brief for Appellants—filed per above order.

September 16, 1987—Argued before Ruth B. Ginsburg, Silberman and Williams, C.J.'s.

January 22, 1988—Opinion for the Court filed by Circuit Judge Silberman.

January 22, 1988—Dissenting Opinion filed by Circuit Judge Ruth B. Ginsburg.

January 22, 1988—Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby reversed, in accordance with the Opinion for the Court filed herein in this date.

January 22, 1988—Mandate Order.

January 26, 1988—Appellee's Emergency Motion to Stay Issuance of Mandate.

January 26, 1988—Appellee's Motion for Expeditious Consideraton.

January 29, 1988—Appellant's (Olson) Response to Emergency Moton.

January 29, 1988—Appellee's Reply to Response to Emergency Motion.

February 1, 1988—Per Curiam order that to allow appellee to pursue whatever rights she may have to seek further review of this court's decision, the mandates of this court shall be stayed for 30 days from the date of this order (see order for details) and that the stay of mandates requested by appellee and granted by this court is conditioned upon appellee not exercising during the pendency of the stay and unless the Supreme Court otherwise directs any authority purportedly conferred by 28 U.S.C. 591-598, with the exception of the acts directly incident to pursuing the right to appeal set forth in 28 U.S.C. 594(a)(3) and that appellee's request for modification of conditions of stay of confinement is denied. Ruth B. Ginsburg, Silberman and Williams, C.J.'s.

February 1, 1988—Appellant's Notice of Appeal to the Supreme Court of the United States.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

To: Edward C. Schmults
Vice President and General Counsel
GTE Corporation
1 Stamford Forum
Stamford, CT 06904

SUBPOENA TO TESTIFY BEFORE GRAND JURY

Subpoena for:

☒ Person ☐ Documents or Object(s)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place

United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

Room

Grand Jury Room #2
(third floor, main hall)

Date and Time

June 11, 1987 at 10:00 A.M.

* * * *

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk James F. Davey

(By) Deputy Clerk /s/ Bryan Whittington

Date May 19, 1987

This subpoena is issued upon application of the United States of America

Name, Address and Phone Number of
Assistant U.S. Attorney

Alexia Morrison, Independent Counsel
Richard C. Otto, Deputy Independent Counsel
2600 Virginia Avenue, N.W. Suite 1112
Washington, D.C. 20037 (202) 333-0025

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

To: Edward C. Schmults
Vice President and General Counsel
GTE Corporation
1 Stamford Forum
Stamford, CT 06904

SUBPOENA TO TESTIFY BEFORE GRAND JURY

Subpoena for:

☐ Person ☒ Documents or Object(s)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place

United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

Room

Grand Jury Room #2
(third floor, main hall)

Date and Time

June 4, 1987 at 10:00 A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

the documents described in the attachment hereto.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk James F. Davey

(By) Deputy Clerk /s/ Bryan Whittington

Date May 19, 1987

This subpoena is issued upon application of the United States of America

Name, Address and Phone Number of
Assistant U.S. Attorney

Alexia Morrison, Independent Counsel
Richard C. Otto, Deputy Independent Counsel
2600 Virginia Avenue, N.W. Suite 1112
Washington, D.C. 20037 (202) 333-0025

ATTACHMENT TO SUBPOENA FOR EDWARD C. SCHMULTS
(June 4, 1987)

Any and all handwritten or typed documents or copies of documents, whether in draft or final form, specifically including, but not limited to, any notes, memoranda, correspondence, diaries, journals, logs, chronologies, or any other documents or copies of documents, of any kind, prepared by you or any other person, whether for personal purposes, or in your former official capacity as Deputy Attorney General, United States Department of Justice, or for any other reason, at any time from September 1, 1982 until the present, which are now in your possession or reasonably subject to your control and which relate or pertain in any way to either:

1) the controversy between the legislative and executive branches which began in September, 1982, when two Congressional subcommittees subpoenaed document relating to Superfund from the Environmental Protection Agency and the President, on the advice of the Department of Justice, directed the Administrator of the Environmental Protection Agency to assert, on his behalf, a claim of executive privilege in response to those subpoenas; or

2) the investigation of the activities of the Department of Justice during the controversy described in paragraph 1, above, conducted by the House Judiciary Committee between February, 1983, and cember, 1985, the results of which are set forth in the *Report of the Committee on the Judiciary of the House of Representatives (Ninety-Ninth Congress, First Session) on Investigation of the Role of the Department of Justice in the withholding of Environmental Protection Agency Documents from Congress in 1982-83.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

To: Theodore B. Olson
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036

SUBPOENA TO TESTIFY BEFORE GRAND JURY

Subpoena for:

☐ Person ☒ Documents or Object(s)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place

United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

Room

Grand Jury Room #2
(third floor, main hall

Date and Time

June 9, 1987 at 10:00 A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

the documents described in the attachment hereto.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk James F. Davey

(By) Deputy Clerk /s/ Bryan Whittington

Date May 22, 1987

This subpoena is issued upon application of the United States of America

Name, Address and Phone Number of
Assistant U.S. Attorney

Alexia Morrison, Independent Counsel
Richard C. Otto, Deputy Independent Counsel
2600 Virginia Avenue, N.W., Suite 1112
Washington, D.C. 20037 (202) 333-0025

ATTACHMENT TO SUBPOENA FOR DOCUMENTS FROM THEODORE B. OLSON
(June 9, 1987)

Any and all handwritten or typed documents or copies of documents, whether in draft or final form, specifically including, but not limited to, any notes, memoranda, correspondence, diaries, journals, logs, chronologies, or any other documents or copies of documents, of any kind, prepared by you or any other person, whether for personal purposes, or in your former official capacity as Assistant Attorney General, United States Department of Justice, Office of Legal Counsel, or for any other reason, at any time from September 1, 1982 until the present, which are now in your possession or reasonably subject to your control and which relate or pertain in any way to either:

1) the controversy between the legislative and executive branches which began in September, 1982, when two Congressional subcommittees subpoenaed documents relating to the Superfund from the Environmental Protection Agency and the President, on the advice of the Department of Justice, directed the Administrator of the Environmental Protection Agency to assert, on his behalf, a claim of executive privilege in response to those subpoenas; or

2) the investigation of the activities of the Department of Justice during the controversy described in paragraph 1, above, conducted by the House Judiciary Committee between February, 1983 and December, 1985, the results of which are set forth in the *Report of the Committee on the Judiciary of the House of Representatives (Ninety-Ninth Congress, First Session) on Investigation of the Role of the Department of Justice in the withholding of Environmental Protection Agency Documents from Congress in 1982-83.*

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

To: Carol E. Dinkins
Vinson and Elkins
3300 First City Tower
10001 Fannin Street
Houston, Texas 77002-6760

SUBPOENA TO TESTIFY BEFORE GRAND JURY

Subpoena for:

☒ Person ☐ Documents or Object(s)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place

United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

Room

Grand Jury Room #2
(third floor, main hall)

Date and Time

June 18, 1987 at 10:00 A.M.

• • • •

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk James F. Davey

(By) Deputy Clerk /s/ Bryan Whittington

Date June 4, 1987

This subpoena is issued upon application of the United States of America

Name, Address and Phone Number of
Assistant U.S. Attorney

Alexia Morrison, Independent Counsel
Richard C. Otto, Deputy Independent Counsel
2600 Virginia Avenue, N.W. Suite 1112
Washington, D.C. 20037 (202) 333-0025

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

To: Carol E. Dinkins
Vinson and Elkins
3300 First City Tower
10001 Fannin Street
Houston, Texas 77002-6760

SUBPOENA TO TESTIFY BEFORE GRAND JURY

Subpoena for:

☐ Person ☒ Documents or Object(s)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place

United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

Room

Grand Jury Room #2
(third floor, main hall

Date and Time

June 16, 1987 at 10:00 A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

the documents described in the attachment hereto.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk James F. Davey

(By) Deputy Clerk /s/ Bryan Whittington

Date June 4, 1987

This subpoena is issued upon application of the United States of America

Name, Address and Phone Number of
Assistant U.S. Attorney

Alexia Morrison, Independent Counsel
Richard C. Otto, Deputy Independent Counsel
2600 Virginia Avenue, N.W. Suite 1112
Washington, D.C. 20037 (202) 333-0025

ATTACHMENT TO SUBPOENA FOR DOCUMENTS FROM CAROL E. DINKINS

(June 16, 1987)

Any and all handwritten or typed documents or copies of documents, whether in draft or final form, specifically including, but not limited to, any notes, memoranda, correspondence, diaries, journals, logs, chronologies, or any other documents or copies of documents, of any kind, prepared by you or any other person, whether for personal purposes, or in your former official capacity as Assistant Attorney General, United States Department of Justice, Lands and Natural Resources Division, or for any other reason, at any time from September 1, 1982 until the present, which are now in your possession or reasonably subject to your control and which relate or pertain in any way to either:

1) the controversy between the legislative and executive branches which began in September, 1982, when two Congressional subcommittees subpoenaed documents relating to Superfund from the Environmental Protection Agency and the President, on the advice of the Department of Justice, directed the Administrator of the Environmental Protection Agency to assert, on his behalf, a claim of executive privilege in response to those subpoenas; or

2) the investigation of the activities of the Department of Justice during the controversy described in paragraph 1, above, conducted by the House Judiciary Committee between February, 1983, and December, 1985, the results of which are

set forth in the *Report of the Committee on the Judiciary of the House of Representatives (Ninety-Ninth Congress, First Session) on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 87-0197
Under Seal

IN RE SEALED CASE

ORDER

Upon consideration of the Motion to Quash Grand Jury Subpoenas filed in the above-captioned case, the Opposition thereto and the entire record in this matter, and in accordance with the Memorandum entered this date, it is by the Court this 20th day of July, 1987,

ORDERED, that the Motion to Quash is DENIED.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 87-0205
Under Seal

IN RE SEALED CASE

ORDER

Upon consideration of the Motion to Quash Grand Jury Subpoenas filed in the above-captioned case, the Opposition thereto and the entire record in this matter, and in accordance with the Memorandum entered this date, it is by the Court this 20th day of July, 1987,

ORDERED, that the Motion to Quash is DENIED.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 87-0205
Under Seal

IN RE SEALED CASE

[Filed July 20, 1987]

MEMORANDUM

Movant's Motion to Quash Grand Jury Subpoena in the above-captioned matter raises two contentions. The first —that the Independent Counsel provisions of the Ethics in Government Act are unconstitutional—was dismissed as without merit in the Court's public memorandum filed this date.

Movant's second argument is that the grant or jurisdiction in this matter violates both the Independent Counsel provisions of the Ethics in Government Act and the Constitution. The Court issues this memorandum under seal as this contention reveals the subject of this grand jury investigation and is thus a matter occurring before the grand jury pursuant to Federal Rule of Criminal Procedure 6(e) and Local Rule 302.

Movant's argument requires no extended discussion as the Court in *In re Olson*, No. 86-1, D.C. Cir. Indep. Couns. Div., April 2, 1987, described the scope of this Independent Counsel's jurisdiction at pages 23-25. The subpoena at issue in this matter is appropriate under that grant of jurisdiction.

An appropriate Sealed Order accompanies this Memorandum.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

Date: July 20, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 87-0215
Under Seal

IN RE SEALED CASE

ORDER

Upon consideration of the Motion to Quash Grand Jury Subpoenas filed in the above-captioned case, the Opposition thereto and the entire record in this matter, and in accordance with the Memoranda entered this date, it is by the Court this 20th day of July, 1987,

ORDERED, that the Motion to Quash is DENIED.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 87-0205
(Under Seal)

IN RE SEALED CASE

ORDER

Upon consideration of the Motion for Reconsideration of Sealed Memorandum and Order, the Opposition thereto and the entire record in this matter, it is by the Court this 4th day of August, 1987,

ORDERED, that the Motion is DENIED and that Movant shall comply forthwith with the subpoena issued to him.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

February 22, 1988

Alexia Morrison, Esq.
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Re: 87-1279—Alexia Morrison, Independent Counsel v. Theodore B. Olson, Edward C. Schmults and Carol E. Dinkins

Dear Ms. Morrison:

The Court today entered the following order in the above stated case:

"In this case probable jurisdiction is noted. The motion of Lawrence Walsh, Independent Counsel, for leave to file a brief as *amicus curiae* is granted. The motions to establish an expedited schedule for briefing and oral argument are granted. Appellant's brief shall be filed by 3 p.m. March 9, 1988. Appellees' briefs shall be filed by 3 p.m. April 8, 1988. Reply briefs, if any, shall be filed by 3 p.m. April 18, 1988. Oral argument is set for April 26, 1988 at 10 a.m. The motion to dispense temporarily with printing briefs is denied. The motions for additional time for oral argument are denied without prejudice. The application for full stay of mandate of the United States Court of Appeals for the District of Columbia Circuit presented to the Chief Justice and by him referred to the Court is granted pending the sending down of the judgment of this Court. Justice Kennedy took no part in the

consideration or decision of these motions and orders."

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

Sandy Nelsen
Assistant Clerk

Enclosures

FILED
MAR 9-. 1988
CLERK

No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR APPELLANT

ALEXIA MORRISON
Independent Counsel
(Counsel of Record)
EARL C. DUDLEY, JR.
RICHARD C. OTTO
Deputy Independent Counsel
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

LOUIS F. CLAIBORNE
Appellate Counsel
Counsel for Appellant

March 9, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether a federal court may, consistent with the limitations of Article III of the Constitution and the prudential considerations governing the exercise of judicial power, entertain a challenge by the recipient of a grand jury subpoena to the constitutionality of the statute empowering the prosecutor conducting the investigation to proceed.

2. Whether an independent counsel appointed pursuant to Title VI of the Ethics in Government Act, 28 U.S.C. §§ 49, 591 *et seq.*, to conduct a single criminal investigation with precisely defined prosecutorial jurisdiction is a "principal" officer of the United States whose appointment is required by the Appointments Clause, U.S. Const., art. II, § 2, cl. 2, to be made by the President with the advice and consent of the Senate.

3. Whether, assuming such an independent counsel is an "inferior" officer within the meaning of the Appointments Clause, her appointment by a court of law is so "incongruous" as to transgress either the intended boundaries of the Clause or the limitations on judicial activity imposed by Article III.

4. Whether the separation of powers principle is offended by a statute empowering a court of law to appoint such an independent counsel and define her prosecutorial jurisdiction and insulating the conduct of the office from Executive Branch control, *inter alia*, by limiting the Attorney General's power of removal.

PARTIES

The appellant is Alexia Morrison, independent counsel. Appellees are Theodore B. Olson, Edward C. Schmults and Carol E. Dinkins.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1279

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinions of the court of appeals (J.S. App. 1a-128a) are not yet reported. The opinion of the district court (J.S. App. 129a-39a) is reported at 665 F. Supp. 56.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1988. The notice of appeal and the jurisdictional statement were filed on February 1, 1988. This Court noted probable jurisdiction on February 22, 1988. The jurisdiction of this Court rests upon 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. II, § 2, cl. 2, and art. III are set forth in the Appendix hereto. Title VI of the Ethics in Government Act of 1978, as amended by Pub. L. No. 97-409, 96 Stat. 2039 (1983), 28 U.S.C. §§ 591-599 is set forth in the Appendix to the Jurisdictional Statement. Those sections of the Act amended in 1987 with immediate effect by Pub. L. No. 100-191, 101 Stat. 1293 (1987), are set forth in the Appendix hereto.

STATEMENT OF THE CASE

1. The Background of the Olson Investigation

In 1982 two Subcommittees of the House of Representatives subpoenaed documents from the Environmental Protection Agency. Acting on the advice of the Department of Justice, the President ordered the Administrator of EPA to invoke executive privilege to withhold certain of the documents, on the ground that they contained "enforcement sensitive" information whose release could imperil ongoing administrative and judicial proceedings. The Administrator obeyed the President's order.

The House voted to hold the Administrator in contempt. The United States Attorney took no steps to prosecute the contempt, and the Department sued the House for a declaration that the claim of privilege was valid.[1]

It emerged that certain of the withheld documents contained evidence of political manipulation of the "Superfund" hazardous waste site clean-up program. The executive privilege claim was subsequently abandoned, the Administrator resigned, and one high-level EPA official was convicted of making a false statement.

The House Judiciary Committee undertook an investigation of the Justice Department's role in the EPA

[1] The district court dismissed the action. *See United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

documents controversy. During that investigation, appellee Theodore B. Olson, then Assistant Attorney General for the Office of Legal Counsel, testified before the Subcommittee on Monopolies and Commercial Law on March 10, 1983. Both before and after that testimony, the Department produced documents responsive to the Committee's requests. It withheld from production both handwritten notes of participants in the documents controversy and chronologies prepared within the Department, without informing the Committee that it was doing so. In April 1984 the Committee learned of the existence of the notes and chronologies, and they were turned over several months later.

The Committee published an extensive report of its investigation on December 4, 1985.[2] The report questioned the truthfulness of Mr. Olson's testimony in a number of respects. It also suggested that appellees Edward C. Schmults and Carol E. Dinkins, at the time of these events Deputy Attorney General and Assistant Attorney General for the Lands and Natural Resources Division respectively, may have engaged in acts, including the withholding of the notes and chronologies, that obstructed the Committee's investigation. Committee Chairman Peter W. Rodino, Jr., forwarded the report to Attorney General Edwin Meese III on December 12, 1985, with a formal request that the latter seek the appointment of an independent counsel under Title VI of the Ethics in Government Act, 28 U.S.C. §§ 49, 591 *et seq.*, to investigate the Committee's allegations.

2. The Statutory Scheme

Title VI was first enacted in 1978,[3] in immediate response to the Watergate experience, but more broadly in response to repeated historical demonstrations that public confidence in the integrity of law enforcement is

[2] *See* H.R. Rep. No. 435, 99th Cong., 1st Sess. (1985).

[3] *See* Pub. L. No. 95-521, 92 Stat. 1867 (1978).

eroded when an Administration is faced with allegations of serious criminal misconduct by its own highly placed officials.[4] It has been reenacted twice with amendments responsive to experience under its provisions, most recently in December 1987.[5]

The Act requires the Attorney General, upon receipt of "information that [he] determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in [serious criminal conduct]," [6] to conduct "such preliminary investigation of the matter as the Attorney General deems appropriate." 28 U.S.C. § 592(a)(1). The compass of the Act is quite narrow: it applies only to allegations involving the President, the Vice President, cabinet rank officers, highly placed members of the Executive Office of the President and the Department of Justice, the Director and Deputy Director of Central Intelligence, the Commissioner of Internal Revenue and the top officials of the President's national political campaign.[7]

If the Attorney General determines following the preliminary investigation that "there are no reasonable grounds to believe that further investigation or prosecution is warranted," he is required to notify the Special Division of the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appoint-

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[4] *See, e.g.*, S. Rep. No. 496, 97th Cong., 2d Sess. 4-5 (1982).

[5] *See* Pub. L. No. 97-409, 96 Stat. 2039 (1983); Pub. L. No. 100-191, 101 Stat. 1293 (1987).

[6] The statute applies to alleged violations "of any Federal criminal law other than a violation constituting a Class B or C misdemeanor or an infraction." 28 U.S.C. § 591(a).

[7] *See* 28 U.S.C. § 591(b). The Attorney General may also invoke the procedures of the Act with respect to any other person if he determines that "the investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial or political conflict of interest." 28 U.S.C. § 591(c).

ing Independent Counsels,[8] which then has "no power to appoint [an] independent counsel." 28 U.S.C. § 592(b)(1). If, on the other hand, the Attorney General determines following the preliminary investigation that there are "reasonable grounds to believe that further investigation or prosecution is warranted," he is directed to apply to the Division for the appointment of an independent counsel. 28 U.S.C. § 592(c)(1).

In his application the Attorney General must supply "sufficient information to assist the division of the court to select [an] independent counsel and to define that independent counsel's prosecutorial jurisdiction." [9] 28 U.S.C. § 592(d)(1). The application and accompanying materials are automatically sealed, subject to the order of the Division. 28 U.S.C. § 592(d)(2). Once an independent counsel has been appointed, the Attorney General may, on his own determination, 28 U.S.C. § 592(e), or at the request of the independent counsel, 28 U.S.C. § 594(e), refer to the independent counsel additional matters related to the initial investigation.

The powers of the Division under the statute are strictly circumscribed. Upon application by the Attorney General, § 593(b) authorizes the Division to "appoint an appropriate independent counsel and . . . define that independent counsel's prosecutorial jurisdiction" within the limits imposed by § 592(b)(1). The Division is also empowered to fill vacancies in the office of independent counsel, 28 U.S.C. § 593(e), and to expand the jurisdiction of an existing independent counsel upon application by the Attorney General, 28 U.S.C. § 593(c), but it may not

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[8] The Division is established by 28 U.S.C. § 49. Its members are designated by the Chief Justice from among Senior Circuit Judges.

[9] While the statute does not require it, the practice of the Department is to submit with the application a proposed statement of the independent counsel's jurisdiction.

grant additional jurisdiction over matters rejected by the Attorney General, *In re Olson*, 818 F.2d 34, 47 (D.C. Cir. Indep. Couns. Div. 1987).[10] The Division has no control over an independent counsel's conduct of the investigation or prosecution, and its members are ineligible to sit in review on any matter "which involves such independent counsel . . . or . . . the exercise of such independent counsel's official duties," 28 U.S.C. § 49(f).

An independent counsel has "with respect to all matters in such independent counsel's prosecutorial jurisdiction . . ., full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [or] the Attorney General . . .," with the exception of the power to apply for electronic surveillance under 18 U.S.C. § 2516. 28 U.S.C. § 594(a). The Department of Justice is required to "suspend all investigations and proceedings with respect to" a matter within the prosecutorial jurisdiction of an independent counsel, except to the extent that the independent counsel requests assistance. 28 U.S.C. § 597(a). An independent counsel may appoint, fix the compensation and assign the duties of employees necessary to the investigation, 28 U.S.C. § 594(c), may request assistance, including "resources and personnel" from the Department of Justice, 28 U.S.C. § 594(d), and may seek referral of "related matters" from either the Attorney General or the Division, 28 U.S.C. § 594(e), though the Division may not refer matters which the Attorney General has declined to refer, *In re Olson*, 818 F.2d at 47.

[10] In one instance, involving the Iran/Contra investigation, the Division granted an independent counsel, at the time of appointment, broader prosecutorial jurisdiction than the Attorney General had requested. J.S. App. 78a. That order, however, antedated the decision in *In re Olson*. Moreover, the Attorney General made no protest of the jurisdictional grant when it was made and in fact duplicated it when he provided the independent counsel with a parallel appointment pursuant to regulation. 28 C.F.R. Part 600; 52 Fed. Reg. 7270 (1987).

An independent counsel must "except where not possible, comply with the written or other established policies of the Department of Justice respecting the enforcement of the criminal laws," 28 U.S.C. § 594(f), and the statute permits him to dismiss matters within his jurisdiction without even conducting an investigation where that would be consistent with Justice Department policies, 28 U.S.C. § 594(g). An independent counsel must file at the conclusion of his investigation or prosecution a report on his activities with the Division, 28 U.S.C. §§ 595(b)(1), (2), which may release all or part of the report to Congress, the public or any appropriate person, 28 U.S.C. § 595(b)(3).

The Act lodges the power to remove an independent counsel exclusively with the Attorney General,[11] who may, however, act only "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1). An independent counsel who has been removed by the Attorney General may bring a civil action for reinstatement. 28 U.S.C. § 596(a)(3).[12]

The office of an independent counsel terminates when he notifies the Attorney General that the mission of the

[11] Congress may remove an independent counsel through the impeachment process. 28 U.S.C. § 596(a)(1).

[12] One of the principal differences between the 1983 version of the Act, under which appellant was appointed, and the 1987 version involves this civil action. The 1983 legislation vested the Division with exclusive jurisdiction to hear such a case and authorized reinstatement or other appropriate relief upon a finding that the removal of the independent counsel "was based on error of law or fact." 28 U.S.C. § 596(a)(3). The 1987 reenactment transferred jurisdiction over such a suit to the district court for the District of Columbia and omitted reference to the "error of law or fact" standard. *See* Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1305 (1987). This provision is immediately applicable to all existing independent counsel. *Id.*, § 6, 101 Stat. 1307-08. *See* pp. 22-23 & notes 33-34 *infra*.

office is complete and he files the required report with the Division on his investigation. 28 U.S.C. § 596(b)(1). The Division may, on its own motion or that of the Attorney General, terminate the office earlier upon a finding that the investigation of all matters within the independent counsel's jurisdiction and any resulting prosecutions "have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." 28 U.S.C. § 596(b)(2).

The role of Congress under the Act is limited to the receipt of reports and the conduct of appropriate oversight. *See* 28 U.S.C. §§ 595(a), (d).[13]

3. Proceedings Under the Act in the Olson Investigation

Upon receipt of the Judiciary Committee report, the Attorney General directed the Public Integrity Section of the Criminal Division to conduct a preliminary investigation. In a lengthy and careful report, Public Integrity concluded that the appointment of an independent counsel was warranted to investigate the Committee's allegations regarding the conduct of appellees Olson, Schmults and Dinkins.[14] Because many high-level Criminal Divi-

[13] A majority of the members of either party of the Judiciary Committee of either House may formally request the Attorney General to appoint an independent counsel, and the Attorney General is required to provide written notification of any action he has taken in response to the request. 28 U.S.C. § 595(e). In addition, an independent counsel is required to advise the House of Representatives of "any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment." 28 U.S.C. § 595(c).

[14] Analysis & Recommendations Concerning the Report of the House Judiciary Committee, Public Integrity Section, April 4, 1986, at 151-52. The materials cited in this section were not made a part of the record in the district court. They are, however, all public portions of the record before the Division in *In re Olson*. A copy of these materials has been lodged with the Clerk of the Court.

sion officials recused themselves, the Public Integrity Report was reviewed by Deputy Assistant Attorney General John C. Keeney and then United States Attorney for the District of Massachusetts William F. Weld, who acted as the Attorney General's Special Assistant in the matter. Mr. Keeney recommended the appointment of an independent counsel to investigate Mr. Olson alone.[15] Mr. Weld recommended the appointment of an independent counsel to investigate the allegations against Messrs. Olson and Schmults, but not Ms. Dinkins.[16]

Overruling the views of virtually all the professional prosecutors on his staff, the Attorney General on April 10, 1986, applied to the Division for the appointment of an independent counsel solely with respect to the conduct of Mr. Olson.[17] The Attorney General concluded on the basis of the preliminary investigation that Mr. Schmults and Ms. Dinkins both lacked the requisite "criminal intent" to obstruct the Committee's investigation.[18] He requested that the independent counsel be given jurisdiction to investigate whether Mr. Olson gave false testimony to the Subcommittee "and any other matter related to that allegation." [19]

On April 23, 1986, the Division appointed James C. McKay as independent counsel to investigate

> whether testimony of Mr. Theodore Olson and his revision of such testimony on March 10, 1983, vio-

[15] *See* Memorandum, John C. Keeney to William F. Weld, April 4, 1986, at 8.

[16] *See* Memorandum, William F. Weld to Attorney General, April 4, 1986, at 1, 4, 8.

[17] *See* Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in the United States House Judiciary Committee Report, April 10, 1986, at 11.

[18] *See id.* at 22, 47.

[19] *See id.* at 2-3, 11.

> lated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law . . . [and] any other allegation or evidence of violation of any Federal criminal law by Theodore Olson developed during . . . and connected with or arising out of that investigation . . . .[20]

Mr. McKay later resigned, and the Division on May 29, 1986, appointed appellant to replace him, with the same jurisdiction.

Following the initial stages of the investigation, appellant applied to the Attorney General under § 594(e) for referral of the allegations regarding appellees Schmults and Dinkins as "related matters."[21] On December 17, 1986, the Attorney General declined the requested referral, on the ground that he had previously considered the issue and that his decision was final under § 592(b)(1).[22]

On January 13, 1987, appellant sought referral of the Schmults and Dinkins matters from the Division under § 594(e). The Attorney General opposed the referral, as did Mr. Schmults and Ms. Dinkins, appearing as *amici curiae*. On April 2, 1987, the Division ruled that the Attorney General's original determination that there were no reasonable grounds for further investigation of Mr. Schmults and Ms. Dinkins was final and unreviewable under § 592(b)(1), and hence that it had no power to make the requested referral under § 594(e). *In re Olson*. The Division went on, however, to interpret the original grant of jurisdiction to permit inquiry into whether Mr. Olson may have participated with others,

[20] Order of April 23, 1986, No. 86-1, D.C. Cir. Indep. Couns. Div., at 1-2.

[21] *See* Letter, Alexia Morrison to Edwin Meese III, November 14, 1986.

[22] *See* Letter, Arnold I. Burns to Alexia Morrison, December 17, 1986.

including Mr. Schmults and Ms. Dinkins, in an unlawful scheme to obstruct the Judiciary Committee's investigation. 818 F.2d at 47-48.

4. The Litigation of the Constitutional Issues

In May and June 1987 grand jury subpoenas *ad testificandum* and *duces tecum* were served on Mr. Schmults and Ms. Dinkins. J.A. 9, 11, 17, 19. A subpoena *duces tecum* for documents only was also served on Mr. Olson. J.A. 14. All three moved to quash the subpoenas on the ground that the Act was unconstitutional and hence that appellant was without authority to proceed.[23] They claimed that the Act violated the separation of powers principle, the Appointments Clause of the Constitution, art. II, § 2, cl. 2, and the strictures of Article III.

The district court on July 20, 1987, upheld the constitutionality of Title VI. J.S. App. 129a. Appellees declined to obey the order to comply with the subpoenas. Accordingly, on August 18 and 19, 1987, the district court held all three in contempt of court pursuant to 28 U.S.C. § 1826(a) and ordered them confined for the life of the grand jury or until they complied with the subpoenas. *Id.* at 140a-48a. The court stayed the effect of its orders of confinement pending expedited appellate review.

A divided panel of the court of appeals reversed, finding the statute unconstitutional in several respects. The majority, in an opinion by Circuit Judge Laurence H. Silberman, held (1) that an independent counsel is a "principal" officer of the United States and thus is re-

[23] Mr. Olson argued separately that the scope of the investigation exceeded the powers of the independent counsel under the appointing order and the statute. This argument was rejected by the district court, and the court of appeals did not reach it, apparently in light of its conclusion that the Act was unconstitutional. Judge Ruth Bader Ginsburg, dissenting in the court of appeals, found the contention unripe for judicial review. J.S. App. 127a-28a.

quired by the Appointments Clause to be nominated by the President and confirmed by the Senate; (2) that the Appointments Clause cannot be read to permit appointment by a court of law of "inferior" officers performing executive functions; (3) that the limitations on the Executive Branch's power to remove an independent counsel and the insulation of the independent counsel's activities from Executive Branch control invade the President's power to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3; (4) that this incursion is not justified by any concerns legitimately within the purview of the Congress; and (5) that the Act involves the Judicial Branch in the prosecutive function in derogation of the limitations of Article III and of the neutral role envisioned by the separation of powers principle, thus creating unacceptable risks for individual liberty. Circuit Judge Ruth Bader Ginsburg dissented.[24]

SUMMARY OF ARGUMENT

I.

Our threshold submission is that the constitutional questions decided below were not, and are not, ripe for adjudication. That is because, under *Blair v. United States*, 250 U.S. 273 (1919), a witness subpoenaed by a grand jury cannot challenge the constitutionality of the statute underlying the investigation, even after being held in contempt for failure to comply. He may assert a testimonial privilege or other objection personal to him in

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[24] The majority also rejected appellant's contention, based on *Blair v. United States*, 250 U.S. 273, 283 (1919), that a recipient of a grand jury subpoena cannot challenge the constitutionality of a statute on a motion to quash the subpoena. The majority relied on the court of appeals' earlier decision in *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). Alternatively, it held that appellant had waived the ripeness/standing point by failing to raise it in the district court. J.S. App. 9a n.6. Judge Ginsburg did not address these issues.

defense to a subpoena and raise those matters by appeal if his motion is denied and he is adjudicated in contempt. But no court should entertain a general claim going to the jurisdiction of the court or grand jury at least until an indictment is returned. The rule of *Blair*—important as it is to effective law enforcement—remains good law. And the objection to premature consideration of the constitutional issue may be considered at any time.

II.

We next address the challenges to Title VI advanced under the Appointments Clause and Article III. The first question is whether an independent counsel is an "inferior" officer whose appointment, under the Clause, Congress may provide for by alternative means. It is not entirely clear where the constitutional line is drawn between "principal" and "inferior" officers, but there can be no doubt that a temporary special prosecutor with a very limited mandate belongs to the latter category, even if she is not "subordinate" to any other official.

Nothing in the Appointments Clause forbids cross-branch appointments as a general principle. On the contrary, some such appointments are mandated or unquestionably authorized, and there is no justification for imposing an arbitrary barrier in respect of "inferior" Executive Branch officers. Nor does the limiting principle of "congruity" generally exclude the appointment of prosecutorial officers by a court of law, and certainly not in the special situation to which Title VI was addressed.

In large part, the objections to Title VI under Article III are answered by reference to the Appointments Clause: the appointment function expressly authorized for courts in the latter provision must be read as supplementing Article III. And the power of appointment should be deemed to embrace incidental authority to define the mandate of the independent counsel.

III.

Title VI involves no aggrandizement of congressional or judicial power at the expense of the Executive Branch. Accordingly, the proper inquiry, under this Court's separation of powers jurisprudence, is whether the legislative scheme significantly interferes with the executive's performance of its assigned functions, and, if so, whether that impact is justified by an overriding need to promote legitimate congressional objectives.

Although law enforcement is an executive function, there is no absolute prohibition on legislative restrictions that circumscribe presidential discretion or insulate decision-making from the normal chain of command. Criminal prosecution is no exception, as our history attests. Nor is it impermissible to restrict the executive's removal power, at least in respect of "inferior" officers.

To whatever extent Title VI trenches on the prerogatives of the Executive Branch, the justification is ample. The present very limited solution to an uncommon but acute problem goes no further than absolutely necessary to accomplish a wholly proper objective.

Contrary to the fears expressed by the majority below, Title VI presents no threat to individual liberty. Neither the scheme, nor actual experience under it, justifies the charge. If anything, the appointment of an independent counsel in cases of actual or presumptive conflict within the Executive Branch assures the target of an investigation a more detached decision-maker who is not under pressure to prove his integrity by prosecutorial zeal. And the ruling of the independent counsel that prosecution is not warranted is far more significant vindication than a like decision by a political ally within the Administration.

ARGUMENT

Introduction

The majority below reached its result by effectively ignoring the three cardinal rules that must inform judicial consideration of legislation challenged as unconstitutional. The first axiom, of course, is that an Act of Congress is presumed to be constitutional. In every case, a court should be most reluctant to conclude that a coequal branch has broken its oath to obey the Constitution. But deference to the judgment of the Congress is especially called for when what is involved is a peculiarly political problem in the functioning of government, and the legislation drafted to meet it is not a hasty response, but is the product of long and careful consideration. Here, moreover, there is no countervailing basis for suspecting that constitutional boundaries may have been overstepped in consequence of inter-branch feuding: the Congress was exceedingly restrained in its treatment of executive prerogatives and, in any event, wholly eschewed any aggrandizement of its own powers.

Against the backdrop of official corruption in eighteenth century England, it is most unlikely that those who wrote our Constitution knowingly foreclosed a measure that would tend—however modestly—to combat the evil of unpunished malfeasance in high office. Just as the Constitution is "not a suicide pact" in external affairs, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), so it ought not be presumed to disable the government of the nation from guarding against such internal dangers, *see Buckley v. Valeo*, 424 U.S. 1, 121 (1976). Respect for the insight of the Framers—no less than deference to the Congress of today—counsels judicial restraint in this setting.

The court of appeals majority also ignored the second axiom, that, where fairly possible, statutes should be construed so as to save them from unconstitutionality. *E.g., NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01

(1979). Again and again, as we detail below, the court of appeals gave provisions of the statute unnecessarily wide scope and thereby created constitutional problems that would not exist under a more sympathetic construction.

Finally, the court below did not exhaust the ways of avoiding constitutional adjudication, as was its duty. *E.g., Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982). The suggestion that all or some of the constitutional issues were not ripe for consideration, *see* pp. note 33 & pp. 24-29, *infra*, was quickly brushed aside. *See* J.S. App. 9a n.6, 43a n.36. Nor was the court reluctant to reach every conceivable constitutional challenge. Where one ruling was sufficient, the majority below went on to condemn the statute on no less than five independent constitutional grounds.

In these circumstances, our first task is to attempt to restore the true balance by stressing that Title VI of the Ethics in Government Act is not the broad incursion on executive prerogative painted by the majority below, but rather a very measured response to an uncommon, yet significant and recurring, law enforcement problem, which works an exceedingly narrow displacement of traditional executive authority.

Congress enacted Title VI against a backdrop of Executive Branch scandals from Teapot Dome to Watergate, in several of which the Department of Justice was effectively immobilized by a real or apparent conflict of interest.[25] The Senate Committee concluded in 1982:

[25] *See In re Olson*, 818 F.2d at 39-43. Of the eight presidential administrations since World War II, five—those of Presidents Truman, Eisenhower, Nixon, Carter and Reagan—have encountered serious allegations of criminal wrongdoing at the upper echelons of the Executive Branch.

The court below disputed Congress' conclusion that "this ostensible problem is truly a conflict of interest." J.S. App. 61a. *See also id.* at 64a. This, we submit, amounts to prohibited judicial second-guessing of legislative fact-finding. *See e.g., Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330-31 n.12 (1985).

> When conflicts exist, or when the public believes there are conflicts, public confidence in the prosecutorial decisions is eroded if not totally lost. Thus, a statutory mechanism providing for a temporary special prosecutor is necessary to insulate the Attorney General from making decisions in these instances.[26]

One concern was, of course, that the Attorney General's close relationship, personal and political, with the President and his senior officers might disincline him to prosecute high government officials when he should. But Congress also sought to assure fairness to individuals under scrutiny by insulating prosecutorial decision-making from the political pressures which might be felt by an Attorney General bent on establishing an administration's claim to probity:

> [T]here is also a danger that, in other cases, the Attorney General may bend over backwards to avoid the risk of loss of public confidence in his office, and make a harsh and unfair prosecutorial decision against a public official.[27]

In enacting Title VI, Congress regularized the hitherto haphazard process by which several administrations had divested themselves of the political burden of prosecutorial decision-making in cases involving those close to the President.[28] To be sure, some safeguards against the mal-

[26] S. Rep. No. 496, 97th Cong., 2d Sess. 4 (1982).

[27] *Id.* at 5. The court below, in concluding that the statute endangered the liberties of potential investigative targets, ignored both this ameliorating function of an independent counsel and the parallel name-clearing purpose which the device serves.

[28] In the Teapot Dome scandal Congress authorized the appointment of a special prosecutor "with full power and authority to carry on [criminal] proceedings," H.J. Res. 160, 68th Cong., 1st

function of earlier experiments were added. But that was done with the minimum possible diminution of Executive Branch authority.

First, the Act applies of its own force to no more than a handful of top-level government officials and political confidants of the President.[29] Moreover, the Attorney General has complete control over the invocation of the statutory process. No independent counsel may be appointed except upon his application, and he possesses unreviewable discretion both to refuse to initiate a preliminary investigation, *Dellums v. Smith*, 797 F.2d 817, 818 (9th Cir. 1986); *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984), and to decide whether the results of such an investigation warrant the appointment of an independent counsel, *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984). So also, although § 593(b) directs the Division to define the jurisdiction of an independent counsel, § 592

Sess., 43 Stat. 16 (1924), and President Coolidge appointed such a prosecutor, *see In re Olson*, 818 F.2d at 40. President Nixon initially approved the appointment of Watergate Special Prosecutor Archibald Cox, after whose firing Attorney General Saxbe appointed Leon Jaworski, with full assurance of immunity from presidential interference, embodied in a formal regulation. *See United States v. Nixon*, 418 U.S. 683, 694-95 (1974). Attorney General Bell appointed an official outside the Department of Justice to investigate allegations concerning President Carter and his brother Billy. *See* S. Rep. No. 496, 97th Cong., 2d Sess. 5 (1982).

The present Administration, while recently joining the attack upon the constitutionality of the statute, has invoked the Act on seven known occasions and has recognized the importance of the independent counsel device to public confidence in law enforcement both by making parallel appointments pursuant to regulation of independent counsels previously appointed under the Act, *see* 28 C.F.R. 600; 52 Fed. Reg. 7270 (1987), and by signing rather than vetoing the 1987 renewal of the legislation, despite the President's expressed constitutional doubts, *see* 23 Weekly Comp. Pres. Doc. 1526 (Dec. 15, 1987).

[29] The Attorney General has discretion to invoke the Act's process with respect to other persons. *See note 7 supra.*

(b)(1) has been held to give the Attorney General virtually complete control over the content of that jurisdiction— a prerogative fully exercised in this case by eliminating two potential targets from the investigation. *In re Olson*, 818 F.2d at 47.[30]

Furthermore, while the Attorney General has no direct control over the conduct of an investigation, he alone is granted the power to remove an independent counsel. And the President still enjoys his unfettered constitutional authority to pardon the subject of any federal criminal investigation at any stage of the process. U.S. Const., art. II, § 2, cl. 1; *see Schick v. Reed*, 419 U.S. 256, 260-66 (1974); *Ex parte Garland*, 71 U.S. 333 (1867).

The Executive Branch thus retains, within the narrow compass of the Act, complete power over the initiation of the statutory process; virtually total control over the shape of the independent counsel's investigation; exclusive, albeit limited, authority to remove an independent counsel; and absolute constitutional power to put a stop to an investigation at any moment through the pardon power. The Act takes away only (1) the power to name the prosecutor; (2) supervision of the day-to-day conduct of an investigation which the Attorney General has deemed warranted; and (3) the power to insist that an indictment be sought.

With all respect, we must conclude that the majority below read the statute with a hostile eye in describing

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[30] Judge Ginsburg observed in dissent below that

> the Act must be read to require the court's jurisdictional specification to be substantially as requested by the Attorney General. The essential decision whether to proceed in a given direction toward potential prosecution, then, rests with the Attorney General, not the Special Division.

J.S. App. 97a. The Division's definition of appellant's jurisdiction in this investigation tracked the Attorney General's proposal virtually *verbatim*.

further intrusions into the executive domain. For example, the prevailing opinion states:

> The independent counsel is free to ignore Department of Justice policy if it is "not possible" to follow it, and that judgment is for her alone to make. 28 U.S.C. § 594(f). The consequence of this scheme . . . is that targets of an independent counsel may be subjected to investigations and prosecutions governed by rules different from those that apply to the investigation of any other citizen . . . .

J.S. App. 57a. This is a curious reading of a provision which mandates that an independent counsel "*shall*, except where not possible, comply with" Justice Department prosecution policies.[31] (Emphasis added.) It is doubly curious in the absence of any suggestion by the majority that appellant has "ignored" any such policies in the conduct of this investigation.

Similarly, the majority below perceived a threat to the interests of investigative targets in what it viewed as the isolation of the independent counsel from the resources of the Department of Justice:

> Wise exercise of prosecutorial discretion is dependent in part upon access to officials who are participants in the ongoing process of enforcing the law and who are able to take a longer view of an individual case. Yet the independent counsel is cut off from the accumulated lore and wisdom of career Department of Justice officers, who are in a unique position to evaluate "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan."

[31] Later in the opinion the majority carried this inversion of the statutory scheme even further, stating that "[a]n independent counsel is not required to follow Department of Justice policies . . . ." J.S. App. 72a.

J.S. App. 72a, *quoting Wayte v. United States*, 470 U.S. 598, 607 (1985). Once again, however, the majority created a problem by ignoring the provisions of the statute. An independent counsel is not "cut off from the accumulated lore and wisdom of career Department of Justice officials." Section 594(d) provides that

> [an] independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include . . . the use of the resources and personnel necessary to perform such independent counsel's duties.[32]

The majority below also exaggerated the statutory role of the Special Division, creating an unjustified spectre of judicial entanglement in the prosecutorial process. It stated:

> This Special Court . . . holds over the head of the independent counsel both the broadsword and the rapier to control the pace and depth of the independent counsel's activities.

J.S. App. 82a. This conclusion was based on three provisions of the Act: § 593(b), which was read to give the Division unfettered power to define the jurisdiction of an independent counsel without regard to the views of the Attorney General, J.S. App. 78a-80a; § 596(a)(3), which was viewed as reducing the Attorney General's removal authority to a mere power to petition "the Special Court for a termination order which the Special Court could grant or not following its own independent investigation of the facts and the law," *id.* at 56a; and § 596(b)(2), which was interpreted to mean that the Division "may in effect abolish the office of the independent counsel

[32] The lower court's concern with access to the experience of professional prosecutors is ironic here in light of the fact that it was the Attorney General who chose deliberately to override the recommendations of "career Department of Justice officials" on the question whether further investigation of appellees Schmults and Dinkins was warranted.

whenever two of the judges believe her investigation no longer serves a useful purpose," *id.* at 82a.

In each instance, the majority below at a minimum ignored an available construction of the statute which would have avoided the constitutional question it perceived. We have already shown that § 593(b), when construed together with § 592(b)(1), need not be read—and is not read by the Division—to permit it to grant an independent counsel authority to investigate matters which the Attorney General has considered and rejected. *See* pp. 18-19 & n.30 *supra*.

With respect to § 596(a)(3), it should first be said that neither the Division nor the Department has had occasion to construe the provision.[33] Moreover, although the majority below insisted on disregarding it, J.S. App. 53a n.41, the fact is that Congress has amended § 596(a)(3), with immediate effect, in two significant ways: (1) it removed jurisdiction of an action by an independent counsel challenging a removal decision of the Attorney General from the Division and placed it in the district court; and (2) it deleted the "error of fact or law" language relied upon by the court below, rendering it clear that the judicial standard of review is whether the Attorney General had "good cause" to remove the independent counsel. *See* note 12 *supra*. Thus, "here-and-now subservience" of the independent counsel to the Division which the majority perceived—if it ever existed—has

[33] No Attorney General has ever removed any independent counsel. The provision is thus arguably "unripe" for consideration in the present context. The majority rejected this approach, relying on *Bowsher v. Synar*, 106 S. Ct. 3181, 3189 n.5 (1986). J.S. App. 43a-44a n.36. In *Bowsher*, however, the existence of the removal power was deemed to create a subservience on the part of the Comptroller General to Congress. The question with respect to Title VI, by contrast, is whether limitations on the Attorney General's removal power impermissibly limit his control over an independent counsel, a question which would seem to require some factual context for resolution.

been erased, and that erasure applies to this independent counsel.[34]

Finally, the majority below likewise both ignored the fact that the Division has never invoked § 596(b)(2) to terminate the office of any independent counsel and read into this provision far broader power than its language

[34] Even assuming that it properly ignored the 1987 amendments, the majority still construed the earlier version of § 596(a)(3) unnecessarily to expand the Division's authority. There is no reason to read the "error of fact or law" language in § 596(a)(3) to abrogate the Attorney General's power under § 596(a)(1) to remove an independent counsel for "good cause," and to make the Division into a "superior and revising agency," J.S. App. 55a, with the authority to ignore the Attorney General's determination at its whim. Compare art. III, § 2, cl. 2 of the Constitution, which gives this Court "appellate jurisdiction, both as to Law and Fact," in the vast bulk of the cases coming before it.

The majority's reading also contradicts clear congressional statements in 1983 and 1987 about the intent of the 1983 version. Congress in 1983 amended § 596(a)(1) to change the removal standard from "extraordinary improprieties" to "good cause." The Senate Committee explained:

> Testimony . . . showed that the present standard of "extraordinary impropriety" is undefinable. Amending the standard to allow the Attorney General to remove the special prosecutor "for good cause"—a standard which is used for removal of the heads of independent agencies—would allow the Attorney General, ***and the court which has judicial review of such removals under 28 U.S.C. section 596***, to have a developed body of law to govern the standard of removal.

S. Rep. No. 496, 97th Cong., 2d Sess. 17 (1982) (emphasis added). Similarly, the 1987 Conference Report, discussing the elimination of the "error of fact or law" language from § 596(a)(3), explained that no substantive change was intended:

> the conferees want to avoid any possibility that [the omitted language] would be viewed as having established a different standard [from "good cause"]. ***The intent of the statute as originally enacted, and as reauthorized***, is that the courts should apply the standards established by existing case law on removal of such officials.

H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 37 (1987) (emphasis added).

actually imports. The provision empowers the Division to terminate the office of an independent counsel only upon a finding that the mission of the office has been entirely or substantially completed. This is a far cry from permitting the Division to "abolish the office of the independent counsel whenever two of the judges believe her investigation no longer serves a useful purpose." J.S. App. 82a.

I. APPELLEES WERE NOT ENTITLED TO CHALLENGE THE CONSTITUTIONALITY OF TITLE VI IN RESPONSE TO THE GRAND JURY SUBPOENAS.

We submit that the present case is controlled by *Blair v. United States*, 250 U.S. 273, 283 (1919), in which this Court squarely held that a witness subpoenaed by a grand jury and adjudged in contempt for refusing to obey is

> not entitled to raise any question about the constitutionality of the statutes under which the grand jury's investigation was conducted.

The ruling in *Blair* was predicated on two separate but congruent concerns. The first relates, under the rubric of ripeness or standing, to the propriety of the exercise of judicial power:

> Considerations of propriety, as well as long-established practice, demand that we refrain from passing on the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.

250 U.S. at 279. The Court considered "the relation of a witness to the proceeding in which he is called," and concluded that "he is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under scrutiny." *Id.*

The Court was equally concerned with the effective functioning of the grand jury. After developing the history of the institution, it noted:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Id. at 282. Accordingly, it was held that "witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation." *Id.*

The Court recognized that certain objections to a subpoena, by their very nature, are lost if they are not entertained prior to compliance. It pointed in this regard to a witness' Fifth Amendment privilege, and added that "perhaps in other cases for special reasons a witness may be excused from telling all that he knows." *Id.* at 281. But absent such special circumstances

> the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

Id. at 282.

There is not a hint in any opinion of this Court that the authority of *Blair v. United States* has been weakened by the passage of time or by any intervening event. To the contrary, the Court has adhered scrupulously to both aspects of the *Blair* holding. The ripeness and standing requirements have regularly been applied to constitutional challenges to state and federal action. *E.g., Pennell v. City of San Jose*, 108 S. Ct. 849 (1988); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982) (*quoting Blair*); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981). And the Court likewise has consistently declined to entertain constitutional claims that could interfere with the functioning of the grand jury, and that are not based on es-

tablished testimonial privileges or other claims to withhold evidence that would be lost by compliance, citing *Blair* in the process. *See, e.g., United States v. Calandra*, 414 U.S. 338, 345-46 (1974); *United States v. Dionisio*, 410 U.S. 1, 10 (1973); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *Costello v. United States*, 350 U.S. 359, 362-63 & n.6 (1956).

Nonetheless, the court of appeals in *In re Sealed Case*, 827 F.2d 776, 779 (D.C. Cir. 1987)—the precedent followed below, J.S. App. 9a n.6—perceived a "tension" between *Blair* and *United States v. Ryan*, 402 U.S. 530 (1971), and held that *Ryan* permitted the entertainment of a constitutional challenge to Title VI by the recipient of a grand jury subpoena.[35] But, in fact, there is no suggestion in *Ryan* that any inroad was intended on *Blair*, which is not even cited. This was doubtless because the two cases speak to entirely different issues. *Ryan* involved, not an issue of ripeness or standing, but of finality for purposes of appeal. The recipient of a grand jury subpoena *duces tecum* moved to quash the subpoena on the ground that to comply would be unduly burdensome. The district court denied the motion to quash, and the witness, without refusing to obey and being held in contempt, appealed. This Court reaffirmed the holding of *Cobbledick v. United States*, 309 U.S. 323 (1940), that

> one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey.

402 U.S. at 532.

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[35] The constitutional issue was not ultimately reached in that case, the court upholding the powers of the independent counsel there on the basis of his parallel appointment by the Attorney General. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S. Ct. 753 (1988).

Here, we do not question that appellees may appeal the contempt order entered against them. But that conclusion does not speak to whether the constitutional challenge was ripe for decision by the district court. *Ryan* did not purport to broaden the class of issues that may be raised on a motion to quash, and the Court there certainly did not suggest it was authorizing a challenge to the constitutionality of the statute under which the grand jury issued the subpoena. A passage in *Ryan*, it is true, speaks of an attack on a subpoena as unduly burdensome or "otherwise unlawful." *Id.* This perhaps unguarded dictum must be read in context. The complaint in *Ryan* that the subpoena *duces tecum* was too broad, imposing an undue burden on the witness, was akin to a testimonial privilege which, if not adjudicated on the motion to quash, would be lost forever. In the circumstances it would be extraordinary if the Court intended to overrule *sub silentio* so venerable and important a precedent as *Blair*.

Plainly, a challenge to the constitutionality of Title VI, unlike such personal claims as an assertion of testimonial privilege or a claim of burdensome overbreadth, is not forever lost through compliance with a subpoena. It is a point that can be raised and decided in the context of any criminal case that eventuates by any defendant.[36] In the meanwhile, the witness will have been put to the inconvenience of giving evidence. But, as this Court said in *Blair*, "the personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." 250 U.S. at 281.

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[36] This is precisely the ground on which the courts have rebuffed several prior attempts to obtain pre-conviction review of the constitutionality of Title VI by injunctive action, *see Deaver v. Seymour*, 656 F. Supp. 900, 902 (D.D.C.), *aff'd*, 822 F.2d 66 (D.C. Cir.), *stay denied*, 107 S. Ct. 3177, *cert. denied*, 108 S. Ct. 99 (1987); *North v. Walsh*, 656 F. Supp. 414, 421 (D.C. 1987), and by immediate appeal of the denial of a pretrial motion to dismiss an indictment, *see United States v. Deaver*, No. 87-3028, D.C. Cir., June 15, 1987, *cert. denied*, 108 S.Ct. 99 (1987). The only difference

Ryan aside, we recognize that there may well be extreme cases in which a subpoena is open to challenge on the ground that it is in no sense a legitimate command, either because the issuing agency is not even a *de facto* grand jury or because the applicant for the subpoena is without color of authority to provoke its issuance. That is not the present situation. Here the regularly convened grand jury is not itself vulnerable to attack. And whatever the ultimate decision with respect to the constitutionality of Title VI, the independent counsel is acting pursuant to authority expressly conferred by a law which was duly enacted by the Congress and the President and which must be presumed constitutional. This, we suggest, is indistinguishable from *Blair*, where the challenge was to the constitutionality of the statute, possible violations of which the grand jury was investigating.

We are also unable to accept the conclusion of the majority below that "this is [not] a jurisdictional issue," J.S. App. 9a n.6, and that appellant waived the ripeness/standing point by not raising it in the district court.[37]

This Court has repeatedly held that issues of ripeness and standing implicate Article III's requirement of a "Case or Controversy," *e.g.*, *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *United Public Workers v.*

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between this litigation and an injunction action is that grand jury subpoenas have been issued, but compliance with such a subpoena, absent a privilege claim or its functional equivalent, is not the sort of burden that will sustain litigation of constitutional issues.

[37] Only days before appellees moved to quash their subpoenas, the court of appeals ruled in *In re Sealed Case* that Lt. Col. Oliver North could challenge the constitutionality of Title VI in a procedurally identical posture. The opinion was sealed, though the order reversing the district court on the ripeness issue was public. By the time the appeals in this litigation were briefed, the court of appeals had unsealed its opinion in *In re Sealed Case*. Upon review of that opinion, appellant raised the issue in the court of appeals.

Mitchell, 330 U.S. 75, 89-91 (1947), or prudential concerns for the avoidance of unnecessary constitutional decisions, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). For this reason, such questions may not be "waived" or stipulated away by the parties, but may be considered at any stage of the litigation and on the Court's own motion. *Bender*, 475 U.S. at 541-42; *Regional Rail Cases*, 419 U.S. at 138; *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). *See also, e.g., American Federation of Gov't Employees v. O'Connor*, 747 F.2d 748, 752 (D.C. Cir. 1984); *Duke City Lumber Co. v. Butz*, 539 F.2d 220, 221 n.2 (D.C. Cir. 1976).[38]

II. THE APPOINTMENTS CLAUSE AUTHORIZES CONGRESS TO VEST IN A "COURT OF LAW" THE POWER TO APPOINT INDEPENDENT COUNSELS AND TO DEFINE THEIR TEMPORARY PROSECUTORIAL JURISDICTION.

The majority below held that Title VI violates the Appointments Clause of the Constitution, art. II, § 2, cl. 2, for two independent reasons: (1) because in its view an independent counsel is a "principal officer" requiring presidential nomination and Senate confirmation, Congress could not constitutionally entrust her appointment to a court, J.S. App. 10a-23a; and (2) because, even if an independent counsel is an "inferior Officer," the Clause does not authorize Congress to provide for "inter-branch" appointments generally and judicial appointments of prosecuting officers in particular, *id.* at 29a-42a. Neither conclusion is correct.

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[38] *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984), cited below, provides no support to the majority's waiver holding. There the court refused to entertain for the first time on appeal, not an issue of justiciability, but an entirely new substantive theory of recovery.

A. Congress Properly Denominated Independent Counsels "Inferior Officers."

The Appointments Clause provides:

> [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

On its face, this text broadly divides "Officers of the United States"[29] into two categories: (1) "Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court," whose appointment must be made by the President by and with the advice and consent of the Senate; and (2) "all other Officers of the United States, whose Appointments are not herein otherwise provided for," at least some of whom are "inferior Officers" whose appointments may be vested by Congress in "the President alone, in the Courts of Law, or in the Heads of Departments." An independent counsel plainly does not fall into the first category; the question is whether she is among those in the second category with respect to whom Congress may designate an alternative method of appointment. In sum, can she properly be denominated an "inferior Officer"?

One possible way of construing the proviso of the Appointments Clause is to read the words "such inferior

[29] Not all persons employed by the federal government are "officers" subject to the strictures of the Appointments Clause; some subordinates are "employees" whose appointments may be made by relatively low level "officers." *Auffmordt v. Hedden*, 137 U.S. 310 (1890); *United States v. Germaine*, 99 U.S. 508 (1879); *see Buckley v. Valeo*, 424 U.S. 1, 126 (1976). It is not disputed that the independent counsel is an "Officer of the United States" as defined in *Buckley*.

Officers" as embracing *all* appointed officials in the second category—all officers other than those mentioned at the outset (Ambassadors etc. and Justices of this Court). Although far from unambiguous, the only decision of this Court remotely on point, *United States v. Germaine*, 99 U.S. 508, 509-10 (1879) (dictum) (emphasis added), seems to support this construction:

> The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided, in regard to *officers inferior to those specially mentioned*, Congress might by law vest their appointment in the President alone, the courts of law, or in the heads of departments.

While it is possible to understand the Court's reference to officers "specially mentioned" as embracing those identified in the proviso as well as in the first sentence of the Appointments Clause, that is not the most natural reading. And as we note below, "inferior" here—as in the Constitution—presumably means "*lesser* than," not "*subordinate* to."

The evolution of the Appointments Clause at the Convention suggests the same result. Until two weeks before the end of their deliberations, the delegates had tentatively accepted a division of the appointment power under which the Senate alone appointed Ambassadors and Justices of this Court and the President alone appointed all other officers. *See, e.g.*, 2 M. Farrand, *The Records of the Federal Convention of 1787* 183, 185 (rev. ed. 1911). There was, however, unease at the unconfined discretion left in the hands of the President, and it was suggested that Congress be empowered to provide otherwise—including delegation to state authority—in respect of the appointment of officers other than Ambassadors and Justices. *Id.* at 398-99, 405-06, 407. Accordingly, the issue was referred to a committee comprising a member from

each state. *See id.* at 406 n.12, 419 n.15, 473, 481. The Committee of Eleven sought to compromise by giving all appointments to the President, all, however, subject to Senate confirmation. *Id.* at 495, 498-99. But as soon as the new clause was taken up, various objections were interposed. *Id.* at 538-39. Although it was initially adopted unchanged, *id.* at 539, the existing proviso was added a week later, *id.* at 627-28. This scenario may well indicate a determination to restore something like the original scheme, retaining mandatory participation by the Senate only for diplomatic agents and Supreme Court Justices, while at the same time allaying fears of presidential abuse by introducing the possibility of new appointive agencies, at the option of Congress, for all other cases.[49]

It is not necessarily an objection that this reading of the Appointments Clause characterizes department heads and federal judges other than Justices of this Court as "inferior" officers. After all, the Constitution itself speaks of all lower federal tribunals as "inferior Courts." Art. I, § 8, cl. 9; art. III, § 1. And the head of an Executive Department is, of course, a subordinate of the President. We may add that there is no reason to doubt the Framers' willingness to concede such relatively wide discretion to the Congress on the score of appointments. The power was circumscribed and pointedly foreclosed any self-dealing, the Congress itself being excluded from

[49] There are indications that some Representatives in the First Congress believed heads of department were not, constitutionally, "inferior Officers," albeit those were mere passing remarks in the context of debate focusing on the *removal* power of the President. *See* 1 *Annals of Congress* 371-72 (1834). Congressman Richard Bland Lee of Virginia expressed the opposite view. *Id.* at 372. James Madison's statement, *id.* at 371-72, is ambiguous and it is not clear that the question was ever resolved, since deleting any reference to the appointing authority for department heads would, under the Appointments Clause, result in presidential appointment subject to Senate confirmation, whether the officer is "principal" or "inferior."

any appointing role. *See Buckley v. Valeo*, 424 U.S. 1, 125-30 (1976). Indeed, the proviso added to the Appointments Clause only permits Congress to *abdicate* the otherwise applicable confirmation prerogative of the Senate in favor of the Executive or Judicial Branch. And, of course, Congress remains entirely free to forego the option granted by the proviso and to retain the traditional appointment formula for any "inferior" officer.

Notwithstanding what has just been said, we do not rest on this broad view of congressional authority. Nor need the Court resolve the question. For present purposes, it is quite sufficient to decide that an independent counsel falls within a narrower category of lesser officers whose appointment Congress is free to vest in one of the specified alternative agencies. Perhaps "inferior Officers" comprise all those not mentioned anywhere in the Constitution. We are content to define the category as including those federal appointees who rank below judges and department heads. And, in assessing the relative importance of any office claimed to be "inferior"—necessarily one created by law—it is of course appropriate to examine the duties and powers and tenure assigned to it by Congress. Nor is it irrelevant to notice what compensation level has been fixed. It is, after all, Congress that determines the status of the officer when it defines the office.

No elaborate argument is needed to show that, under the suggested test, an independent counsel ranks as a mere "inferior" officer. The salary is fixed at Executive Level IV, three grades below the Attorney General. 28 U.S.C. § 594(b). And his duties and powers are severely restricted in scope—by the specific referral made—and in time. *See* 28 U.S.C. § 594. As both the district court and the Division concluded, on a functional view of the office, an independent counsel "is clearly an 'inferior officer'—he is appointed for a single task to serve for a temporary limited period." *In re Olson*, 818 F.2d at 44;

J.S. App. 131a-32a.[41] Precedent also supports classification of an independent counsel as an "inferior Officer." Temporary judicial appointments of United States Attorneys, who exercise the full panoply of prosecutorial powers on a much broader scale, have been upheld on the ground that they are "inferior Officers." *United States v. Solomon*, 216 F. Supp. 835, 840-43 (S.D.N.Y. 1963); *cf. Rice v. Ames*, 180 U.S. 371, 378 (1901) (U.S. Commissioners empowered to conduct extradition proceedings are "inferior Officers" properly appointed by a court).[42] Moreover, the D.C. Circuit has approved the appointment by the Attorney General of independent counsels exercising power "identical to that provided to an independent counsel by the Ethics Act." *In re Sealed Case*, 829 F.2d 50, 52 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S. Ct. 753 (1988).[43] Since the Attorney General may, as a "head of department," appoint only "inferior Officers," it must follow, on a functional analysis, that statutory independent counsels are likewise "inferior Officers." [44]

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[41] *Cf. United States v. Germaine*, 99 U.S. 508, 511-12 (1879) (distinction between "officers" and "employees' turns upon "the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional and temporary").

[42] *See also Hobson v. Hansen*, 265 F. Supp. 902, 911-16 (D.D.C. 1967) (3-judge court) (alternative holding) (upholding judicial appointment of members of District of Columbia School Board on ground they were "inferior Officers").

[43] *See* note 35 *supra*.

[44] The majority below sought to avoid this inevitable conclusion on two grounds: (1) apellant, having refused a proffered "parallel appointment" from the Attorney General, "cannot now base an argument for constitutional inferiority on the Attorney General's appointment power that she has explicitly rejected," J.S. App. 19a; and (2) where the Attorney General has appointed an independent counsel pursuant to regulation, he remains free to rescind the regulation and terminate the appointment, *id.* at 18a. The first argument is a *non sequitur*. The second is fatally flawed. Under the majority's purported functional analysis, it is the powers and duties of the office which must determine its "principal" or "inferior"

The objection interposed by the court below—that the independent counsel cannot be an "inferior Officer" because she is not "subordinate to a principal officer," J.S. App. 17a—is wholly without foundation.

It is reasonably clear that the term "inferior" is not used in the Appointments Clause in a hierarchical sense. To make "subordinacy" the touchstone of "inferior" status would, for example, collide with the majority's insistence that department heads are "principal" officers: each of them is plainly "subordinate" to the President and serves at his pleasure. On the other hand, the lower court judges whom the majority below insisted are not "inferior Officers," J.S. App. 11a, are members of what the Constitution expressly labels "inferior Courts." The fact is that the word "inferior" does not now, and did not when the Constitution was written, necessarily mean "subordinate to a superior"; it is perhaps more frequently used to mean "lower in place or importance." [45]

This is apparently the view adopted by the Court in *Ex parte Siebold*, 100 U.S. 371 (1880), where it upheld judicial appointment of federal election supervisors as "inferior Officers," *id.* at 397-98, even though they were not "subordinate" to any superiors who could direct their activities or remove them from office, *id.* at 379-80.[46]

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status, and it is inconceivable that the identical office is an "inferior" one when its occupant is appointed by a "Head of Department" and a "principal" one when its occupant is appointed by a "Court of Law."

[45] Webster's *Third New International Dictionary* 1158 (unabridged ed. 1981). For usage at the time of the Convention, *see* 1 S. Johnson, *A Dictionary of the English Language* (1785), which gives subordinate as only the fourth and last meaning for "inferior."

[46] *Cf. United States v. Eaton*, 169 U.S. 331, 343 (1898) (Vice Consul remains "inferior Officer" even when serving as Acting Consul; temporary performance of duties does not "transform [him] into the superior and permanent official"). This has long been the understanding under which Congress has acted. Thus, for instance, the President alone is by law authorized to appoint the

In any event, if appellant is deemed to require a "superior," she has one, at least in the constitutionally significant sense—the Attorney General. His exclusive, though limited, power to remove an independent counsel, 28 U.S.C. § 596(a)(1), is at least as strong as Congress' power over the Comptroller General, which was held by this Court to create "here-and-now subservience" in *Bowsher v. Synar*, 106 S.Ct. 3181, 3188-89 & n.5 (1986). The grounds for removal of an independent counsel are indistinguishable in substance from those for removal of a Comptroller General, *compare* 28 U.S.C. § 596(a)(1) *with* 31 U.S.C. § 703(e)(1), and the removal of an independent counsel requires only the stroke of the Attorney General's pen, while that of the Comptroller General demands a Joint Resolution of both Houses of Congress, subject to presidential veto.[47]

B. There Is No Unconstitutional "Incongruity" in Lodging the Appointment of a Temporary Prosecuting Official in a Court of Law.

Assuming *arguendo* that an independent counsel is an "inferior Officer," the court below went on to void her appointment by the Special Division because "the Constitution generally precludes inter-branch appointments,"

Architect of the Capitol, 40 U.S.C. § 162, an officer within the legislative branch, 2 U.S.C. §§ 60-1(b)(2), 701(e), without any superior other than the Congress itself. This necessarily endorses the view that an "inferior Officer" need not be the subordinate of any other officer.

[47] The majority below rejected the view that the Attorney General can be the "constitutional superior" of an independent counsel, on the ground that he "has essentially only the authority to petition the Special Court to authorize the removal of an independent counsel." J.S. App. 19a. This view, however, rests on the majority's untenable reading of § 596(a)(3). *See* pp. 22-23 *supra*. The Act provides for nothing more than judicial review of the Attorney General's "good cause" determination. And the Court in *Bowsher* declined to decide whether Congress' removal of a Comptroller General would be subject to judicial review, evidently not deeming it of controlling significance. *See* 106 S. Ct. at 3190 & n.8.

and furthermore, "court appointment of prosecutors presents a more fundamental incongruity with our constitutional scheme than virtually any other type of inter-branch appointment." J.S. App. 42a. We answer each proposition in turn.

To begin with, nothing in the language of the Appointments Clause purports to limit Congress' choice of a particular appointing authority for any specific "inferior Officer." Indeed, more than a century ago, this Court found in the language of the Clause a textual commitment of that choice to Congress:

> [A]s the Constitution stands, *the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress.* And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise.

Ex parte Siebold, 100 U.S. at 397-98 (emphasis added).[48] On this basis, *Siebold* upheld judicial appointment of fed-

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[48] The position of the majority below ultimately rested on an earlier *dictum* in *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 257-58 (1839), where the Court, in approving judicial appointment and removal of a court clerk, remarked that the constitutional appointment power "was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." Even the majority below acknowledged that "the impact of this statement was somewhat narrowed by *Ex parte Siebold*." J.S. App. 31a n.23. The constitutional basis of the *Hennen dictum* was, however, squarely rejected by *Siebold*:

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. *But there is no absolute requirement to this effect in the Constitution*; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. . . . *The observation in the case of Hennen . . . was not intended to define the*

eral election supervisors, which had been attacked on the ground that their duties were "entirely executive in their character." *Id.* at 397. *Siebold* thus stands squarely for the proposition that there is no general constitutional prohibition on "inter-branch appointments."[49] *See also Go-Bart Importing Co. v. United States*, 282 U.S. 344, 353 n.2 (1931).

There is, moreover, no reason to suppose the Framers would have condoned cross-branch appointment of "principal" officers, but not inferior ones. The most obvious case of appointment by another branch is this Court. This is not a unique exception, however. It has never been doubted that the Constitution permits, and perhaps requires, the appointment of lower federal judges by the President. And no one questions the President's selection of the Comptroller General, an agent of the Congress, as this Court held in *Bowsher*. *See also* 2 U.S.C. § 701(e). Similar cross-branch appointments of concededly "inferior" officers of the legislative or judicial branch are equally beyond challenge if Congress chooses *not* to exercise the option tendered by the proviso of the Ap-

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constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed.

100 U.S. at 397-98 (emphasis added). Thus the majority's effort to resurrect the *Hennen dictum* as a general constitutional principle runs counter to the holding in *Siebold*.

[49] The majority below sought to distinguish *Siebold* on the ground that it turned on the power of each House of Congress under art. I, § 5, cl. 1, to "be the Judge of the Elections, Returns and Qualifications of its own Members," urging that "Congress presumably could have chosen any method of appointing [the election supervisors] including vesting the appointment power in itself." J.S. App. 36a-37a. This, of course, ignores the issue as framed and decided by the Court in *Siebold*; in any event, it is demonstrably wrong. If the election supervisors were "officers of the United States," as the Court plainly held they were, congressional appointment was forbidden by the Appointments Clause. *Buckley v. Valeo*, 424 U.S. at 125-30.

pointments Clause.[50] It would be strange, indeed, if the Clause must be read to forbid the same result when the legislature expressly foregoes its confirmation power and provides for the appointment of the inferior officer by the President alone.[51] Nor can the Clause be strained to authorize cross-branch appointments by the President or department heads, but not by a court of law. Plainly, there is no general prohibition on cross-branch appointment of inferior officers.

This is not to say that there are no limits whatever. The Court in *Siebold*, while rejecting the attack on "inter-branch" appointments generally and in the case before it, recognized the possibility that not all such appointments might be compatible with the constitutional scheme. A limiting principle was articulated—"incongruity":

> the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void.

Id. at 398.

We may accept *arguendo* that it would be "incongruous" for a court to appoint all the Secretary of Agriculture's subordinates or for the Attorney General to appoint the clerks to federal judges, *see* J.S. App. 39a-40a, but these conclusions do not speak to the problem at hand.[52] Nothing in the few decided cases suggests any

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[50] Two actual examples are the Librarian of Congress and the Public Printer, presumably inferior legislative branch officers, *see* 2 U.S.C. § 701(e), who are appointed by the President with the advice and consent of the Senate, 2 U.S.C. § 136; 44 U.S.C. § 301.

[51] As previously noted, the Architect of the Capitol is appointed by the President alone. 40 U.S.C. § 162.

[52] The majority below repeatedly reasoned *in terrorem* from hypotheticals far removed from the facts of this case. But this Court has recently cautioned against reaching conclusions in concrete separation of powers disputes "out of fear of where some hypotheti-

inherent "incongruity" in judicial appointment of officers exercising "executive" powers. *Siebold* treated the duties of the election supervisors as "entirely executive in their character," 100 U.S. at 397, and lower courts have upheld interim judicial appointment of United States Attorneys, *United States v. Solomon*, 216 F. Supp. at 838-43, and of members of the District of Columbia School Board, *Hobson v. Hansen*, 265 F. Supp. 902, 913-15 (D.D.C. 1967) (3-judge court) (alternative holding).

The majority below argued, however, that court appointment of independent counsels is particularly incongruous "because it blurs that cherished separation of prosecutor and judge which is a crucial aspect of the Constitution's protection of individual liberty." J.S. App. 42a. This is, we submit, a well-turned phrase that both exaggerates the general principle and ignores the particulars of this case. Merely conferring upon a court the duty to appoint a prosecutor—without any power of control or removal—does *not* merge prosecutor and judge. Sufficient proof is the longstanding law that charges district courts with the appointment of interim United States Attorneys, *see Solomon*; Act of Mar. 3, 1863, ch. 93, § 2, 12 Stat. 768, and the equally venerable practice, sustained by this Court in *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987), under which private attorneys are judicially appointed to prosecute contempts of court. In the first instance, the court's appointive role is merely a matter of convenience; in the second, it was deemed justified by necessity. But there can be no objection to invoking the same mechanism when the purpose is to assure the independence of the prosecutor from the political branches.

This is, indeed, a recurrent theme in Anglo-American history. In England, as the Framers well knew (a number of them having received their legal training at the Inns of Court), the Attorney General has always been

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cal 'slippery slope' may deposit us." *CFTC v. Schor*, 106 S. Ct. 3245, 3258 (1986).

independent of the political government when making prosecutorial decisions. That concept has at least partially survived the Atlantic crossing. Here, too, the prosecutor is expected to be above politics. *See Berger v. United States*, 295 U.S. 78, 88 (1935). *See also United States v. Nixon*, 418 U.S. 683, 694 (1974). One traditional way of furthering that independence, common in eighteenth century America and in many states even today, is to lodge the appointment of the prosecutor in a court of law.[53]

Significantly, the original draft of the First Judiciary Act, primarily the work of Oliver Ellsworth and William Paterson,[54] provided for judicial appointment of the Attorney General and United States Attorneys. *See* J.S. App. 122a-23a n.41; Warren, *supra*, at 108-09. Although the Senate later substituted presidential appointment in both cases,[55] there is not the slightest ground for concluding that this was done on constitutional grounds.[56]

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[53] *E.g.*, 2 Z. Swift, *Digest of the Laws of the State of Connecticut* 369 (1823 ed.); Nat'l Ass'n of Attorneys General, *Powers, Duties and Operations of State Attorneys General* 77-79 (1977); *see, e.g.*, Tenn. Code Ann. § 8-6-101 (1980); Conn. Gen. Stat. §§ 51-275 *et seq.*

[54] See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 57, 59-63 (1923).

[55] *Id.* at 109 n.137. Although Section 35 of the Judiciary Act as finally enacted, 1 Stat. 92-93, does not expressly specify who appoints the Attorney General and the United States Attorneys, the result of not otherwise providing, according to the Appointments Clause, is that the President has the appointment, subject to Senate confirmation.

[56] Whatever view one takes about the status of "Heads of Departments" as "principal" or "inferior" officers, the Attorney General did not then qualify as such. He had no department, he had no supervision of the United States Attorneys, and he represented the government only in this Court. Judiciary Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 93. Moreover, the salary of the Attorney General was then far below that of the three Department Heads (Foreign Affairs, Treasury and War). Act of Sept. 23, 1789, ch. 18, 1 Stat. 72; Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67. He ranked well below them and was not deemed a member of the Cabinet. *See*

Indeed, it ought not lightly be assumed that Ellsworth and Paterson, prominent participants in the Constitutional Convention and later Members of this Court, would have overstepped firm boundaries fixed by the Constitution—even by "one line," J.S. App. 35a—or that they would not have been corrected by the three other veterans of the Convention who sat on the Judiciary Committee [57] that reported the bill with the provision for judicial appointment.

It is no accident that, even today, the Attorney General and the Solicitor General are listed as "Officers of the Court" in the official reports of this Court. Unlike other executive department officers, the lawyers of the Department of Justice have a special connection with the courts of law and a duty towards them that sometimes overrides their loyalty to the Administration. Of course, this does not make the prosecutor a subservient agent of the courts. But the special relationship between the judiciary and the bar makes it not inherently inappropriate that judges should sometimes appoint prosecutors—just as every court, including this Court, regularly appoints defense counsel without thereby subverting the lawyer's independence.

A fortiori, there is no "incongruity" in the limited and temporary appointment involved here. The mechanism was devised for reasons not unrelated to those underlying the practice vindicated in *Young*. In this instance, Congress had a powerful reason not to lodge the power of appointment in the Executive Branch, rooted in "the principle that 'no man can be a prosecutor or judge in his own case.'" J.S. App. 110a (Ginsburg, J., dissenting), *quoting* S. Rep. No. 170, 95th Cong., 1st Sess. 5 (1977). This concern with restoring public confidence in the investigation of alleged wrongdoing by high government officials must weigh heavily in the analysis of whether judicial appointment of such officials is unconstitutionally "incongruous." In the circumstances, it seems obvious that vesting appointment of independent counsels in the President "would be incongruous in the extreme, given the purposes of the Act." J.S. App. 123a-24a. Accordingly, constitutionally debarred from assuming the role itself, Congress lodged the power of appointment—if and when requested by the Attorney General—in the only eligible agency, a neutral court of law. That cannot be an improper solution to an infrequent, but acute, embarrassment within the government of the nation.[58]

C. The Powers Granted to the Special Division by Title VI Do Not Contravene the Limitations of Article III.

We deal here with one final point which in large part turns on the Appointments Clause: the holding by the majority below that Article III was violated because the powers conferred on the Division were not judicial, but executive, in nature, and because the Division was improperly entangled in the prosecutorial decision-making process. These conclusions are based on the majority's wholly unnecessary and unacceptably broad construction of the Division's powers. *See* pp. 21-24 *supra*. In fact, the Division performs only two principal tasks under the statute as it now applies to appellant and this investigation: (1) it chooses the individual who conducts the in-

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Act of Mar. 2, 1799, ch. 38, 1 Stat. 729; L. Huston, *Roles of the Attorney General* 4 (1968). Accordingly, it seems almost certain that, at the time, the Attorney General was viewed as an "inferior Officer," whose appointment could be lodged in this Court, unless the result was "incongruous."

[57] Warren, *supra*, at 57. *See also* 1 *Annals of Congress* 18; *Journal of the Senate*, 1st Sess. 10 (1820).

[58] It should be stressed that Title VI guards against the "blur[ring of the] cherished separation of prosecutor and judge" by rendering members of the Division ineligible to sit in review of any actions of an independent counsel, 28 U.S.C. § 49—a protection not found in the statute upheld in *Solomon*, but on which the Court in *Young* placed major reliance, *see* 107 S. Ct. at 2133, *citing In re Oliver*, 333 U.S. 257 (1948).

vestigation and possible prosecution that the Attorney General has found warranted; and (2) it defines the jurisdiction of the independent counsel, within the parameters set by the Attorney General's prior decisions and his application.[59] Neither of these powers does violence to the limitations of Article III.

First, the Division operates under the Act, not exclusively as an Article III court, but as an appointing agency vested with powers by Congress under the Appointments Clause. The specific authorization in art. II, § 2, cl. 2 must take precedence over the more general limitations which may inhere in the provisions of Article III and the concept of separation of powers. *United States v. Solomon*, 216 F. Supp. at 840-41; *see, e.g., Palmore v. United States*, 411 U.S. 389 (1973).[60] Nor should the appointing function be too narrowly understood. At least in the present context, the Appointments Clause permits the court to go beyond the mere naming of an officer and to define his jurisdiction, in the limited way provided by § 593(b). As Judge Ginsburg put it:

> When an appointment is made to a preexisting office, the title of the office may be all that is needed to define the duties of the new appointee. But where a statute provides for ad hoc appointments, such that the office itself must be defined at the time of appointment, the power to define is a necessary incident of the power to appoint.

J.S. App. 125a (footnote omitted).[61]

[59] Upon the motion of the Attorney General, or its own motion, the Division also has the power (never yet called into play) to terminate the office upon a finding that its work has been substantially completed. See pp. 8, 23-24 *supra*.

[60] This is in no way inconsistent with the teaching of cases such as *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851), and *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), relied upon by the majority below, J.S. App. 37a, 77a, holding that Congress may not as a general matter vest courts sitting under Article III with "executive or administrative duties of a nonjudicial nature," *Buckley v. Valeo*, 424 U.S. at 123. Those decisions were not addressing the express authorization of the Appointments Clause.

In any event, the very limited powers assigned to the Division in Title VI—other than the naming of the independent counsel—do not arguably infringe Article III's limitations on the judicial power.

Federal courts sitting under Article III exercise extensive supervisory powers over the conduct of criminal proceedings, frequently on the basis of *ex parte* applications by prosecuting authorities—as for search and arrest warrants—and have done since the beginning of the Republic. *See also, e.g.*, 18 U.S.C. §§ 2516, 2518 (applications to court for approval of electronic surveillance). Moreover, in the early days of the nation, the courts' exercise of the power to charge the grand jury constituted a potent means of controlling the course of law enforcement.

Finally, the courts possess broad powers to initiate prosecutions for contempt of court, including the power to refer such matters to the United States Attorney or to appoint private counsel to prosecute the matter where appropriate. *See* Fed. R. Crim. P. 42; *Young v. United*

[61] *See also Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir.) (*en banc*) (Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984). Similarly, identifying the organizational unit of the Executive Branch to which independent counsel will belong for purposes of application of conflict-of-interest laws—complained of by the majority below, J.S. App. 80a—is a proper incident of the process of definition of the office and designation of a person to fill it. *See id.* at 125a n.46.

Likewise, the hitherto unexercised power to terminate the office upon a finding of substantial completion of its mission, 28 U.S.C. § 596(b)(2), may properly be viewed as an incident of the power to appoint. It is likely, in any event, to be exercised, if ever, only in the context of an adversarial proceeding, in which both the independent counsel and the Attorney General, not to mention potential targets, would be heard, thus satisfying the requirements of art. III. *See* J.S. App. at 126a & n.48.

States ex. rel. Vuitton et Fils S.A. At a minimum, *Young* stands for the proposition that there is no inherent violation of Article III in a court playing a limited role in the invocation of the criminal process and the definition of the bounds of an investigation.

In sum, the limited powers exercised by the Division under Title VI do not differ in substance from those which courts sitting under Article III have traditionally enjoyed.[62]

III. TITLE VI DOES NOT VIOLATE THE SEPARATION OF POWERS PRINCIPLE.

The conclusion that lodging the appointment of the independent counsel in a court of law is authorized by the Appointments Clause goes far to answer the claim that Title VI violates Article III. It likewise refutes many of the arguments advanced under the banner of separation of powers. It surely will be a rare case when the Constitution must be read to take back with one hand what it gave with the other.

What remains, then, is to consider whether *other* aspects of Title VI—beyond the appointment formula—offend the separation of powers principle, either by impermissibly aggrandizing the prerogatives of the Legislative or Judicial Branches or by unduly diminishing the powers of the executive.

A. Title VI Involves No Aggrandizement of Congressional or Judicial Power at the Expense of the Presidency.

Where this Court has invalidated congressional or presidential action under the separation of powers doc-

[62] The majority below rejected appellant's reliance on these long-recognized aspects of judicial power on the ground that they dated from "the earliest days of the Republic and it has been assumed that judges may play a role in each." J.S. App. 83a. This begs the question. The contemporary understanding respecting the courts' "inherent" powers over searches, grand juries, etc., surely bears upon the proper definition of "judicial power" under art. III, which the majority concluded was violated by Title VI.

trine, it generally has found, not merely a limitation or displacement of some peculiarly executive or legislative or judicial prerogatives, but the assertion by one branch of the right to exercise, or to control the exercise, of powers normally allotted to another.[63] In each of these important decisions, the Court acted to prevent such "poaching," the aggrandizement of authority by one branch at the expense of another. Title VI works no such transfer of power. Congress has not reserved for itself any role in the invocation of the statutory process, the appointment of an independent counsel, the designation of investigative targets, the definition of the counsel's jurisdiction, the conduct of the investigation, the decision whether to seek an indictment, or the removal of an independent counsel.[64] The legislature has no power under the Act other than the power of oversight, 28 U.S.C. §§ 595(a), (d), the exercise of which with respect to law enforcement activities has been broadly

[63] *See Myers v. United States*, 272 U.S. 52 (1926) (Senate veto of removals of postmasters interfered with President's power to control performance of executive officers); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (President's seizure of steel mills to avert wartime strike usurped Congress' legislative power); *Wiener v. United States*, 357 U.S. 349 (1958) (President could not diminish, through assertion of removal power, independence of the War Claims Commission); *Buckley v. Valeo*, 424 U.S. 1, 126-32, 138 (1976) (Congress improperly reserved to itself, in contravention of Appointments Clause, power to appoint officers exercising law enforcement functions); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (opinion of Brennan, J.) (Congress sought in Bankruptcy Act to aggrandize its power at expense of judiciary by granting to non-Article III courts jurisdiction to adjudicate traditional common-law actions); *INS v. Chadha*, 462 U.S. 919, 954-55 (1983) (Congress sought to permit exercise of legislative power without bicameral action or presentation to the President); *Bowsher v. Synar*, 106 S. Ct. 3181, 3187-89 (1986) (Congress vested final executive powers in Comptroller General, its own agent, whom it could remove).

[64] Except through the constitutionally defined power of impeachment, 28 U.S.C. § 596(a)(1), which applies to all officers of the United States.

upheld by this Court, *see McGrain v. Daugherty*, 273 U.S. 135 (1927).

Nor does the Act transfer to the Division any law enforcement powers traditionally reserved to the Executive Branch, save the power to designate the individual to conduct the investigation and possible prosecution, which is expressly authorized by the Appointments Clause. The Division may not appoint an independent counsel without an application by the Attorney General, or grant prosecutorial jurisdiction which has been rejected by him, or control the conduct of the investigation. Nor may it direct the independent counsel to bring a prosecution. *Cf. United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). It cannot remove an independent counsel,[65] it may not sit in review on any matter involving the independent counsel, and under the 1987 amendments it is precluded from hearing an action for reinstatement following removal by the Attorney General.

Thus the legislation does not aggrandize the power of either Congress or the judiciary at the expense of the presidency in the way which has prompted this Court to act in prior cases.

B. Title VI Does Not Impermissibly Interfere With the Operation of the Executive Branch.

Where the element of aggrandizement is absent, the question is whether "Congress impermissibly undermined . . . the role of [a coordinate] Branch." *CFTC v. Schor*,

[65] The Division's authority to terminate the office of an independent counsel on the motion of the Attorney General or its own, upon a finding of substantial completion of the office's tasks, 28 U.S.C. § 596(b)(2), was, we have shown, misread by the majority below to permit the Division "to abolish the office whenever two of the judges believe her investigation no longer serves a useful purpose." See pp. 23-24 *supra*. This is not the equivalent of a removal power, and it may not be exercised whenever the Division disagrees with the conduct of an independent counsel. It requires a specific finding of substantial completion of the tasks of the office.

106 S. Ct. 3245, 3261 (1986). In *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), the Court suggested a two-step analysis for "determining whether [an Act of Congress] disrupts the proper balance between the coordinate branches":

> the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

We follow that approach here.

1. *The Act Does Not Prevent the Executive Branch From Accomplishing Its Constitutionally Assigned Functions.*

Essentially, Title VI is said impermissibly to encroach on the prerogatives of the Executive Branch in two ways: (1) that control over a category of criminal prosecutions is removed from the chain of command that ends with the President; and (2) that the independent counsel to whom this "core" executive function is assigned is improperly exempted from the President's constitutional prerogative to fire officers within the Executive Branch at pleasure. We confront the broader claim first and then briefly address the argument concerning removal.

It is undoubtedly true that law enforcement is an executive function, normally undertaken by agents of the President in the discharge of his duty to "take Care that the Laws be faithfully executed." This does not mean, however, that the President must be left free to decide whether he will enforce a given law. *E.g., Kendall v. United States*, 37 U.S. (12 Pet.) 524, 612 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).[66]

[66] *See also Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 584, 604 (D.C. Cir. 1974) (phrase "does not permit the President to refrain from executing laws duly enacted by Congress"); *ICC v. Chatsworth Coop. Marketing Ass'n*, 347 F.2d 821, 822 (7th Cir.

Nor does it follow that the Constitution excuses the President from respecting congressional decisions incorporated in legislation as to how, and by whom, the law shall be executed. See *Bowsher*, 106 S. Ct. at 3207 (White, J. dissenting); *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting). Provided it does not intrude itself or its agents into the business of enforcement (*Bowsher*) or arrogate to itself the appointment of the enforcers (*Buckley*) or reserve a veto over their removal (*Myers*), Congress may, by measures enacted in the constitutional way, substantially circumscribe executive discretion in the administration of the law.

Our longstanding governmental arrangements—unless they are all unconstitutional—exemplify the various ways in which the Legislative Branch may affect law enforcement. Congress has often, for example, established agencies independent of the President's control. Some of these are in some sense removed from the Executive Branch, *see Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935),[67] while others exist expressly within it.[68] Congress has also provided for citizen lawsuits to supplement government law enforcement efforts,[69] and this Court has developed rules for determining when such private rights of action will be implied, *Cort v. Ash*, 422 U.S. 66 (1975). Citizen involvement in law enforcement extends even to *qui tam* actions, which may be initiated without leave of the government, to collect moneys owed

1965) (law enforcement powers of ICC not inconsistent with this phrase).

[67] *See* 15 U.S.C. § 45 (Federal Trade Commission). *See also, e.g.*, 15 U.S.C. §§ 77*s*-77*u* (Securities & Exchange Commission).

[68] *See, e.g.*, Railroad Retirement Board, 45 U.S.C. §§ 231f(a), 355(f), (g); Renegotiation Board, 50 U.S.C. App. §§ 1217, 1218; Merit Systems Protection Board, 5 U.S.C. §§ 1201-1202, 1205; Special Counsel to the Merit Systems Board, 5 U.S.C. §§ 1204, 1206; Parole Commission, 18 U.S.C. §§ 4202-4203.

[69] *See* 15 U.S.C. § 15; 18 U.S.C. § 1964(c).

the United States (with a percentage reward to the citizen) under the False Claims Act, a criminal statute.[70]

These examples suffice to indicate that the concept of a "unitary executive," stressed by the majority below, J.S. App. 27a, is not a guide for defining the irreducible limit of executive power. There is simply no flat rule that all "executive" business, or all law enforcement duties, must be performed by agents under the direct control of the President or those who serve at his pleasure and act at his direction.

The degree to which Congress may divorce an Executive Branch decision-maker from presidential or secretarial supervision and insulate "administrative" rulings from revision by the President or a department head, depends on the subject matter. Historically, the President's unfettered discretion has been acknowledged in those matters which the Constitution itself assigns to him, the conduct of foreign affairs and the command of the military services. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803); *Humphrey's Executor v. United States*, 295 U.S. at 628; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 644 (Jackson, J., concurring). *See also* 1 *Annals of Congress* 512 (Rep. Vining), 521-23 (Rep. Page), 614 (Rep. Madison). But it has always been understood that, with respect to other executive business, Congress may devolve the duties upon an independent officer whose decisions cannot be overturned by the President or other higher officials. *E.g., Kendall*, 37 U.S. (12 Pet.) at 610; *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50 (1884); *Myers*, 272 U.S. at 135; *Humphrey's Executor*. *See also* 1 *Annals of Congress* 611-12, 614 (Rep. Madison questioning the President's right to interfere with the Treasury Comptroller's decisions).

[70] *See* 31 U.S.C. § 3730(b)(1); 18 U.S.C. § 287. *See also United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

Nor is there any special exemption for criminal prosecutions. While criminal prosecution is indisputably an "executive"—as opposed to a "legislative" or "judicial"—function, that does not mean that the President is constitutionally entitled to control every exercise of prosecutorial discretion. In discussing the Appointments Clause, pp. 40-41 *supra*, we have already noted the tradition of prosecutorial independence from political direction. We may add that the history of criminal prosecutions here and in England both before and after the adoption of the Constitution lends no support to the proposition that hands-on presidential control of all criminal prosecutions is a *sine qua non* of effective executive power.[71] In the eighteenth century, criminal prosecutions in England and in the Colonies were entrusted to private counsel, as they mostly are in England to this day.[72] Moreover, as Judge Ginsburg pointed out,

> Prosecution was decentralized during the federalist period, . . . and it was conducted by district attorneys who were private practitioners employed on a fee-for-services basis.[73]

Indeed, "it was not until after Reconstruction and the creation of the Department of Justice in 1870 that the various prosecutors came under any meaningful national supervision." [74]

[71] There is nothing to the contrary in *United States v. Nixon*, 418 U.S. 683, 693 (1974), or *United States v. Cox*, 342 F.2d at 190 (Wisdom, J., concurring). *Cox* merely held that a court may not order a prosecutor to proceed with a case by means of the contempt power—which Title VI does not purport to authorize. And in *Nixon* this Court upheld, over the President's constitutional protest, the power of a special prosecutor appointed with solemn assurances of independence from presidential control to compel the President himself to turn over to a grand jury tapes of his confidential conversations with his aides—a holding from which appellees and the majority below can hardly derive comfort.

[72] *See* R. Jackson, *The Machinery of Justice in England* 213 (7th ed. 1977).

[73] J.S. App. 108a, *citing* L. White, *The Federalists: A Study in Administrative History* 406-08 (1948).

It is unnecessary to consider how far Congress might insulate prosecution from political direction. What is clear, we submit, is that Title VI does not unduly encroach on the executive prerogative. We are dealing with a narrowly tailored measure fashioned to achieve a limited objective—the creation of a law enforcement mechanism where the Executive Branch is disabled to act by virtue of a conflict of interest. Its reach is modest, and it preserves substantial Executive Branch power even within its compass. It was enacted only after repeated historical demonstrations of the inability of the Executive Branch to police its own top echelons in a manner consistent with public confidence in the integrity of law enforcement. Congress plainly has the power in these circumstances to create such a mechanism, where it has not in the process expanded its own powers.

The actions of the Executive Branch itself belie the notion that the narrowly crafted provisions of Title VI disrupt the performance of its constitutionally assigned functions. While the Justice Department has recently joined the attack upon the statute, the Department initially supported it,[75] and Presidents Carter and Reagan

[74] 3 *Encyclopedia of Crime & Justice* 1291 (Kadish ed. 1983); *see* H. Cummings & C. McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 143-46, 225-26 (1937).

The Judiciary Act of 1789 gave the Attorney General no power of supervision over the various district attorneys, as United States Attorneys were then called. Such supervisory power as existed was lodged in the Comptroller General. Act of March 3, 1789, ch. 20, §§ 1-3, 1 Stat. 512-15. Attorney General Randolph requested legislation to authorize him to instruct district attorneys, and President Washington submitted such a proposal to Congress, which did not enact it. L. Huston, *The Department of Justice* 6-8 (1967).

[75] *See* Public Officials Integrity Act of 1977: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 8, 15-17 (1977) (testimony of Acting Ass't Atty. Gen. John M. Harmon).

have signed it into law, the latter twice.[76] Agreement between the President and Congress certainly does not tie the hands of the courts, but at least where the question is whether a statute impermissibly strips the Executive Branch of its fundamental prerogatives, the executive's assent is entitled to substantial weight in the judicial analysis. *See Myers v. United States*, 272 U.S. at 254-59 (Brandeis, J., dissenting); *cf. Nixon v. Administrator of General Services*, 433 U.S. at 441. Furthermore, Presidents since Calvin Coolidge have taken action to divest themselves of law enforcement responsibility in criminal matters affecting high administration officials.[77] Indeed, the Attorney General has promulgated regulations under which independent counsels previously appointed under the statute may be—and have been—reappointed to conduct precisely the same investigations with precisely the same insulation from presidential removal as they had under the Act. *See* 28 C.F.R. Part 600; 52 Fed. Reg. 7270 (1987). It does not seem likely that successive administrations would have acted in this manner if direct control by the President and Attorney General of prosecutions of high government officials were truly essential to the preservation of Executive Branch prerogatives.

Despite the views of the majority below, *see* J.S. App. 42a-53a, the Act's restrictions on the Attorney General's removal power do not violate the separation of powers.[78]

A major strand of this Court's separation of powers jurisprudence involves the power to remove government

[76] President Carter called the legislation "necessary in response to the lessons that we have learned to the embarrassment of our country in the past." 14 Weekly Comp. Pres. Doc. 1855 (Oct. 26, 1978).

[77] *See* note 28 *supra* and accompanying text.

[78] We have already dealt with the further objection, J.S. App. 55a-56a, that the provision for a civil action for reinstatement afforded to a removed independent counsel renders the Division "a 'superior and revising agency' with a veto over the Attorney General's decision." *See* pp. 21-24 *supra*.

officials, *see Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958); *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), on the view that "once an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey," *Bowsher*, 106 S. Ct. at 3188. The teaching of these cases, however, is simply that the power to remove an Executive Branch officer cannot be transferred, in whole or in part, to the Congress. They emphatically do not hold unconstitutional a mere congressional restriction on the executive's power of removal that adds nothing to legislative prerogatives.

Indeed, the decision most jealously defending the rights of the executive, *Myers*, expressly recognized that there is no constitutional objection to such a brake on dismissal of "inferior" executive officers, so long as "Congress [does not] draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power." 272 U.S. at 160-62. This was consistent with the earlier ruling in *United States v. Perkins*, 116 U.S. 483, 485 (1886), and was unanimously reaffirmed in *Humphrey's Executor* and *Wiener*. The rule remains undisturbed.[79]

Title VI plainly meets the test laid down in these precedents. Albeit restricted, the removal power remains in the Attorney General, and Congress has reserved to itself no role in the removal process. Here Congress has, with ample justification, concluded that the public interest demands the creation of a law enforcement mechanism "free from executive control," *Humphrey's Executor*, 295 U.S. at 628, to deal with the recurring problem of allegations

[79] *Bowsher* did not resurrect the theory found in *dicta* in *Myers* that the President must possess unfettered power either to remove or to direct the performance of any officer exercising "executive" or "law enforcement" powers. The Solicitor General made precisely this argument in *Bowsher*, but as Justice White pointed out, the Court was careful not only to avoid any such implication, but to reaffirm the vitality of *Humphrey's Executor* and *Wiener*. 106 S. Ct. at 3206 (White, J., dissenting); *see id.* at 3188 n.4.

of criminal misconduct against high government officials, and that that mechanism can function effectively only if certain limitations are placed upon the power of the Executive Branch to remove the officer temporarily in charge of it. The Constitution is not offended by such an arrangement.

2. *Any Impact on Executive Branch Powers Is Justified by an Overriding Need To Promote an Objective Within the Constitutional Authority of Congress.*

Assuming *arguendo* that the Act creates some potential for disruption of the functioning of the Executive Branch, it nonetheless clearly passes the second prong of the *Nixon* test.

No one suggests that it is beyond the constitutional authority of Congress to attempt to ensure that the criminal laws will be applied to high government officials in a fair and even-handed manner that will secure public confidence in the integrity of the process. The constitutional crisis that grew out of Watergate is a sufficient demonstration that without a mechanism to achieve this goal, there is real question whether we are in fact "a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. at 121.[80]

The achievement of both the fact and the appearance of fairness in the prosecutorial process is essential to ef-

[80] The majority below brushed this argument aside, pointing to the impeachment power, which, it said, "grants to Congress the power, if needed because of criminal behavior, to discipline the President and all of his appointees." J.S. App. 63a. But the existence of the impeachment power does not deprive Congress of the power to enact appropriate legislation designed to avert unseemly and destructive confrontations between the legislature and the executive. Our two experiences with presidential impeachments have more than amply demonstrated the grave national crises to which such proceedings inevitably give rise and the enormous energies that are expended. To suggest that Congress has no room for action short of such proceedings to remedy a recurrent problem of public confidence in the integrity of law enforcement is wholly untenable.

fective law enforcement and hence to effective government in a free society. This Court has repeatedly emphasized that a federal prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. . . . As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935). Only last Term the Court held that the need for a disinterested prosecutor bars the appointment of a lawyer with a potential conflict of interest to investigate and prosecute a criminal contempt of court. *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2135-41 (1987). The Court deemed the point so fundamental that it declined to apply harmless error analysis. *Id.* at 2138-41.

The present case affords the paradigm of a conflict on the part of the Attorney General and the Department, for the subject of the investigation is a former high-level Justice Department official, and the investigation concerns allegations of improprieties pervading the Department's conduct in a serious confrontation with the Legislative Branch. Nothing said by the majority below suggests that the fact and the appearance of fairness can be achieved in these circumstances by an investigation conducted or controlled by the Department.

C. Title VI Poses No Threat to Individual Liberties.

The majority below perceived a threat to personal liberty from Title VI in three respects: (1) viewing the independent counsel as "free to ignore Department of Justice policy" regarding criminal prosecutions, it concluded that "targets of an independent counsel may be subjected to investigations and prosecutions governed by rules different from those that apply to the investigation of any other citizen," J.S. App. 57a; (2) it deemed an

independent counsel unaccountable to anyone and burdened by "unique incentives to seek an indictment," *id.* at 70a; and (3) what it termed the "intimate involvement of an Article III court in the supervision and control of a prosecutorial office," in its view "undermines the status of the judiciary as a neutral forum for the resolution of disputes between citizens and their government," *id.* at 85a. The first and third of these concerns are based on the majority's incorrect reading of the statute. *See* pp. 19-24 *supra*.

An independent counsel is *not* "free to ignore" Justice Department policies; there is no suggestion that *this* independent counsel has "ignored" or violated any Justice Department policy; and any target or defendant being investigated or prosecuted by an independent counsel remains free to complain of any such violations which affect his rights, every bit as much as if the violation was committed by a United States Attorney. Any unjustified departure from Justice Department policy can be brought to the attention of the Attorney General, who could determine whether it constituted "good cause" for the removal of an independent counsel, or to the attention of the district court in the context of a prosecution, where it might be deemed prosecutorial misconduct subject to judicial remedy.

Nor is the Division "intimately involve[d] . . . in the supervision and control of a prosecutorial office." *See* pp. 21-24 *supra*. Moreover, the Division's statutory isolation from review of any of the actions of an independent counsel—cemented by the 1987 amendments to § 596(a)(3)—enhances rather than undermines the "status of the judiciary as a neutral forum." There is not a shred of evidence that defense counsel have been reluctant to attack the conduct of proceedings by independent counsels, or that district and circuit judges have been inhibited to rule against independent counsels, where appropriate.[81]

[81] In addition to the decision below, *see In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987). Moreover, the district court in the *Deaver* prosecution, in perhaps the most celebrated *contretemps* to date in a prosecution by an independent counsel, denied the independent counsel leave to subpoena the Canadian Ambassador. *See United States v. Deaver*, Crim. No. 87-096 (D.D.C. June 23, 1987).

The notion that an independent counsel is either unaccountable or motivated by "unique incentives to seek an indictment" is equally chimerical. An independent counsel is accountable to the Attorney General, who may remove him for "good cause," and to the court before which he brings an indictment to be tried to the same extent as any other prosecutor. An independent counsel must, moreover, file a complete report of his activities with the Division and must cooperate with congressional oversight proceedings.[82] This inevitably intense scrutiny, far from creating "unique incentives to seek an indictment," is likely to encourage great caution by an independent counsel in pursuing prosecutions. In any event, the majority cited no evidence whatever for its conclusion that an independent counsel will need to justify his existence by bringing an indictment, J.S. App. 71a, and it ignored the history of investigations under the Act, which have produced only two indictments, both of which have resulted in convictions.

The court below also ignored the substantial benefits that Congress sought to confer upon high government

[82] The majority below complained that the statutory process is unaccountable to the electorate. J.S. App. 27a. Yet the Act is carefully crafted both to restrain any hint of congressional control of the activities of an independent counsel and to provide for continual review of its functioning and utility by elected officials. Congress has no role in invoking the statute, appointing an independent counsel, supervising his activities, or removing him. Yet the Act's oversight provisions and Congress' refusal on three occasions to make the enactment permanent, give to the electorate an ongoing review of the need for the legislation and the practical functioning of the system. If the results are, in the majority's words, "contrary to the mores of the community, the community has a visible target for its grievances," J.S. App. 27a: it can demand that the legislation not be renewed.

officials accused of crime: the isolation of the process from the pressure on the Attorney General to demonstrate his lack of favoritism, and the greater reputational impact of a refusal to prosecute by one who has no ties to the incumbent Administration.

One who is the subject of scrutiny by an independent counsel retains the full panoply of rights afforded by the Constitution, statutes and rules governing criminal law enforcement—freedom from unreasonable search and seizure and compulsory self-incrimination; the requirement of a grand jury indictment; a trial by a constitutionally selected jury before a neutral judge wholly unconnected with the independent counsel's activities.

In short, the Act removes none of the essential safeguards to liberty of our criminal justice system; to the contrary, by isolating the investigative and prosecutorial funtcions from the pressures of partisan politics, it affords those under scrutiny and the public that "confidence in the disinterested conduct" of the prosecutor which is "essential" in our system. *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. at 2141.

CONCLUSION

For the foregoing reasons the decision below should be reversed and the judgments of contempt affirmed.

Respectfully submitted,

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March 9, 1988

APPENDIX

APPENDIX

Article II, § 2, of the United States Constitution, provides as follows:

> SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Article III, §§ 1 and 2, of the United States Constitution, provide as follows:

> SECTION 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time

to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The following sections of Title VI of the Ethics in Government Act of 1978, were amended in 1987, with immediate application to sitting independent counsels, by Pub. L. No. 101-191, 101 Stat. 1293 (1987).

Section 593(f) ATTORNEYS' FEES.—

(1) AWARD OF FEES.—Upon the request of an individual who is the subject of an investiga-

tion conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the Attorney General of any request for attorneys' fees under this subsection.

(2) EVALUATION OF FEES.—The division of the court may direct the Attorney General to file a written evaluation of any request for attorneys' fees under this subsection, analyzing for each expense—

(A) the sufficiency of the documentation;

(B) the need or justification for the underlying item; and

(C) the reasonableness of the amount of money requested.

Section 594(d)(2) PAYMENT OF AND REPORTS ON EXPENDITURES OF INDEPENDENT COUNSEL.—The Department of Justice shall pay all costs relating to the establishment and operation of any office of independent counsel. The Attorney General shall submit to the Congress, not later than 30 days after the end of each fiscal year, a report on amounts paid during that fiscal year for expenses of investigations and prosecutions by independent counsel. Each such report shall include a statement of all payments made for activities of independent counsel but may not reveal the identity or prosecutorial jurisdiction of any independent counsel which has not been disclosed under section 593(b)(4).

Section 594(h) REPORTS BY INDEPENDENT COUNSEL.—

(1) REQUIRED REPORTS.—An independent counsel shall—

(A) file with the division of the court, with respect to the 6-month period beginning on the date of his or her appointment, and with respect to each 6-month period thereafter until the office of that independent counsel terminates, a report which identifies and explains major expenses, and summarizes all other expenses, incurred by that office during the 6-month period with respect to which the report is filed, and estimates future expenses of that office.

Section 594(i) INDEPENDENCE FROM DEPARTMENT OF JUSTICE.—Each independent counsel appointed under this chapter, and the persons appointed by that independent counsel under subsection (c), are separate from and independent of the Department of Justice for purposes of section 202 through 209 of title 18.

Section 594(j) STANDARDS OF CONDUCT APPLICABLE TO INDEPENDENT COUNSEL, PERSONS SERVING IN THE OFFICE OF AN INDEPENDENT COUNSEL, AND THEIR LAW FIRMS.—

(1) RESTRICTIONS ON EMPLOYMENT WHILE INDEPENDENT COUNSEL AND APPOINTEES ARE SERVING.—(A) During the period in which an independent counsel is serving under this chapter—

(i) such independent counsel, and

(ii) any person associated with a firm with which such independent counsel is associated,

may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(B) During the period in which any person appointed by an independent counsel under subsection (c) is serving in the office of independent counsel, such person may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(2) POST EMPLOYMENT RESTRICTIONS ON INDEPENDENT COUNSEL AND APPOINTEES.—(A) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 3 years following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter if that individual was the subject of an investigation or prosecution under this chapter that was conducted by that independent counsel.

(B) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 1 year following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter involving any investigation or prosecution under this chapter.

(3) ONE-YEAR BAN ON REPRESENTATION BY MEMBERS OF FIRMS OF INDEPENDENT COUNSEL.—Any person who is associated with a firm with which an independent counsel is associated or becomes associated after termination of the service of that independent counsel under this chapter may not, for 1 year following such termination, represent any person in any matter in-

volving any investigation or prosecution under this chapter.

(4) DEFINITIONS.—FOR PURPOSES OF THIS SUBSECTION—

(A) the term 'firm' means a law firm whether organized as a partnership or corporation; and

(B) a person is 'associated' with a firm if that person is an officer, director, partner, or other member or employee of that firm.

Section 594(k) CUSTODY OF RECORDS OF AN INDEPENDENT COUNSEL.—

(1) TRANSFER OF RECORDS.—Upon termination of the office of an independent counsel, that independent counsel shall transfer to the Archivist of the United States all records which have been created or received by that office. Before this transfer, the independent counsel shall clearly identify which of these records are subject to rule 6(e) of the Federal Rules of Criminal Procedure as grand jury materials and which of these records have been classified as national security information. Any records which were compiled by an independent counsel and, upon termination of the independent counsel's office, were stored with the division of the court or elsewhere before the enactment of the Independent Counsel Reauthorization Act of 1987, shall also be transferred to the Archivist of the United States by the division of the court or the person in possession of such records.

(2) MAINTENANCE, USE, AND DISPOSAL OF RECORDS.—Records transferred to the Archivist under this chapter shall be maintained, used,

and disposed of in accordance with chapters 21, 29, and 33 of title 44.

(3) ACCESS TO RECORDS.—

(A) IN GENERAL.—Subject to paragraph (4), access to the records transferred to the Archivist under this chapter shall be governed by section 552 of title 5.

(B) ACCESS BY DEPARTMENT OF JUSTICE.—The Archivist shall, upon written application by the Attorney General, disclose any such records to the Department of Justice for purposes of an ongoing law enforcement investigation or court proceeding, except that, in the case of grand jury materials, such records shall be so disclosed only by order of the court of jurisdiction under rule 6(e) of the Federal Rules of Criminal Procedure.

(C) EXCEPTION.—*Notwithstanding* any restriction on access imposed by law, the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to the records transferred to the Archivist under this chapter.

(4) RECORDS PROVIDED BY CONGRESS.—Records of an investigation conducted by a committee of the House of Representatives or the Senate which are provided to an independent counsel to assist in an investigation or prosecution conducted by that independent counsel—

(A) shall be maintained as a separate body of records within the records of the independent counsel; and

(B) shall, after the records have been transferred to the Archivist under this chapter, be made available, except as provided in paragraph (3)(B) and (C), in accordance with the rules governing release of the records of the House of Congress that provided the records to the independent counsel.

Subparagraph (B) shall not apply to those records which have been surrendered pursuant to grand jury or court proceedings.

Section 596(a)(3) JUDICIAL REVIEW OF REMOVAL.—An independent counsel removed from office may obtain judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia. A member of the division of the court may not hear or determine any such civil action or any appeal of a decision in any such civil action. The independent counsel may be reinstated or granted other appropriate relief by order of the court.

Section 596(c) AUDITS.—After the termination of the office of an independent counsel, the Comptroller General shall conduct an audit of the expenditures of that office, and shall submit to the appropriate committees of the Congress a report on the audit.

§ 599. Termination of effect of chapter

This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1987, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed.

Other Effective Amendments

SEC. 3. STATUS OF INDEPENDENT COUNSEL AS A SPECIAL GOVERNMENT EMPLOYEE; FINANCIAL DISCLOSURE REQUIREMENTS.

(a) AMENDMENT TO TITLE 18.—The first sentence of section 202(a) of title 18, United States Code, is amended—

(1) by striking out "or" after "United States commissioner" and inserting in lieu thereof a comma; and

(2) by striking out the period at the end of the sentence and inserting in lieu thereof the following: ", or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28."

(b) FINANCIAL DISCLOSURE REQUIREMENTS.—

(1) FILING OF REPORTS.—Section 203(b) of the Ethics in Government Act of 1978 is amended by striking out "and the Vice President" and inserting in lieu thereof ", the Vice President, and independent counsel and persons appointed by independent counsel under chapter 40 of title 28."

(2) LIMITATION ON PUBLIC DISCLOSURE.—(A) Section 203(d) of the Ethics in Government Act of 1978 is amended by inserting before the period at the end thereof the following: ", except that any report filed by an independent counsel whose identity has not been disclosed by the division of the court under chapter 40 of title 28, and any report filed by any person appointed by that independent counsel under such

chapter, shall not be made available to the public under this title."

(B) Section 205(a) of the Ethics in Government Act of 1978 is amended by striking out "Each" in the first sentence and inserting in lieu thereof "Except as provided in section 203(d) of this Act, each."

SEC. 4. CLERK OF THE DIVISION OF THE COURT.

Section 49(a) of title 28, United States Code, is amended by adding at the end thereof the following: "The Clerk of the United States Court of Appeals for the District of Columbia Circuit shall serve as the clerk of such division of the court and shall provide such services as are needed by such division of the court."

SEC. 5. TECHNICAL AMENDMENTS.

(a) TITLE 28, UNITED STATES CODE.—Section 49(f) of title 28, United States Code, is amended by striking out "a independent" and inserting in lieu thereof "an independent."

(b) CONTINGENCY FUND.—Section 601(c) of the Ethics in Government Act of 1978 (28 U.S.C. 591 note) is amended by striking out "39 (relating to special prosecutor)" and inserting in lieu thereof "40 (relating to independent counsel)."

SEC. 6. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to subsection (b), the amendments made by this Act take effect on the date of the enactment of this Act.

(b) PENDING PROCEEDINGS.—With respect to any proceeding under chapter 39 of title 28, United States Code (before the redesignation of such chapter as

chapter 40 by section 144(g) of Public Law 99-554), or under chapter 40 of such title (after such redesignation), which is pending on the date of the enactment of this Act, the following shall apply:

(1) Except as provided in paragraphs (2) and (3), the provisions of chapter 40 of such title as in effect on the day before such date of enactment shall, in lieu of the amendments made by this Act, continue to apply on or after such date to such proceeding until such proceeding is terminated in accordance with such chapter.

(2) The following provisions shall apply to such proceeding on or after such date of enactment:

(A) Section 593(f) of title 28, United States Code, as amended by section 2 of this Act, relating to the award of attorneys' fees.

(B) Section 594(d)(2) of such title, as added by section 2 of this Act, to the extent that such section 594(d)(2) relates to reports by the Attorney General on expenditures by independent counsel, except that the first such report shall be made only with respect to expenditures on or after the date of the enactment of this Act.

(C) Section 594(h)(1)(A) of such title, as added by section 2 of this Act, relating to reports by independent counsel, except that the 6-month periods described in such section 594(h)(1)(A) shall be calculated from the date of the enactment of this Act.

(D) Section 594(i) of such title, as added by section 2 of this Act, relating to

the independence of the office of independent counsel for certain purposes.

(E) Section 594(k) of such title, as added by section 2 of this Act, relating to custody of records of independent counsel.

(F) Section 596(a)(3) of such title, as amended by section 2 of this Act, relating to judicial review of the removal of an independent counsel from office.

(G) Section 596(c) of such title, as added by section 2 of this Act, relating to audits of expenditures of independent counsel.

(H) The amendments made by section 3 of this Act, relating to the status of independent counsel and their appointees as special government employees and to their financial disclosure requirements.

(3) Section 594(j) of title 28, United States Code, as added by section 2 of this Act, relating to certain standards of conduct shall, 90 days after the date of the enactment of this Act, apply to a pending proceeding described in this subsection.

MOTION FILED
MAR 9 1988

No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,
v.
THEODORE B. OLSON, EDWARD C. SCHMULTS
and CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL IN SUPPORT OF APPELLANT

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March 9, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Lawrence E. Walsh, Independent Counsel, respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consents of the attorney for appellant and of the attorneys for appellees Olson and Dinkins have been obtained. The consent of the attorney for appellee Schmults has been refused.[1]

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[1] It is not entirely clear that such consent is required. Supreme Court Rule 36.4 states that no consent need be had when the brief is presented for any federal agency authorized to appear in its own

Lawrence E. Walsh was appointed as Independent Counsel in the Iran/Contra matter pursuant to the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. § 591 *et seq.* ("the independent counsel statute")[2] on December 19, 1986. On March 5, 1987, Mr. Walsh received a parallel appointment as Independent Counsel in the Iran/Contra matter pursuant to the Attorney General's independent counsel regulation, 28 C.F.R. §§ 600, 601 (1987). On August 20, 1987, the United States Court of Appeals for the District of Columbia Circuit held that Mr. Walsh and his Associate Counsel have legal authority to pursue their investigation under the Attorney General's parallel appointment. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S.Ct. 753 (1988).

Believing that his appointment as Independent Counsel in the Iran/Contra matter can and should be upheld under the statute as well as under the Attorney General's regulation, which the court below deems subject to revocation "at any time," App. 18a,[3] Mr. Walsh asks to be heard as *amicus curiae* in support of the constitutionality of the independent counsel statute. He also seeks to call attention to an important factor not implicated in Independent Counsel Morrison's investigation which further supports the constitutionality of the independent counsel statute.

That statute contains two criteria pursuant to which the Attorney General may initiate the appointment of an independent counsel: § 591(b) requires the appointment of an independent counsel in certain matters involving specified high government officials, while § 591(c) provides that the Attorney general "may" call for an independent counsel in matters involving other persons "if the Attorney General determines that investigation of such person[s] by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest." The instant appeals relate to an independent counsel appointed under § 591(b); Mr. Walsh is the only independent counsel ever appointed under § 591(c).

When the Attorney General relies upon § 591(c) to initiate the appointment of an independent counsel as he did in the Iran/Contra matter, that appointment is in no sense compelled by the statute, but represents a voluntary decision by the Executive Branch to avail itself of the mechanism the statute provides to guarantee the independence and integrity of a specific criminal investigation as to which the Department of Justice may have a conflict of interest.[4] The availability of the *option* provided by § 591(c), and the fact that the Executive Branch *chose* to invoke that option in the Iran/Contra matter, render especially implausible the view that a core function of the Executive Branch is undermined unless all federal prosecutors are presidential appointees who serve at the pleasure of the President. That in turn strongly supports the constitutionality of the independent

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behalf. Such authorization appears to have been granted to independent counsel by 28 U.S.C. § 594(a)(2). This motion is nevertheless presented as a supplementary precaution.

[2] Citations are to the sections of the 1978 statute rather than to the statute as amended in 1987, except where noted.

[3] References to the Appendix to the Jurisdictional Statement will be styled in this manner.

[4] The Attorney General announced on December 2, 1986, that he was invoking § 591(c) "with the full encouragement and support of the President." The New York Times, Dec. 3, 1986, at A11, col. 1 (excerpts from statement of Attorney General Meese). *See* 22 Weekly Comp.Pres.Doc. 1613 (1986) (December 2, 1986 statement of President Reagan welcoming appointment of an independent counsel); *id.* at 1658 (December 19, 1986 statement of President Reagan promising Independent Counsel Walsh "complete cooperation" from "all members of my administration").

counsel statute, both in the setting of § 591(c) and in general.

Respectfully submitted,

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March 9, 1988

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BRIEF AMICUS CURIAE OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL

INTEREST OF AMICUS CURIAE

The interest of Independent Counsel Lawrence E. Walsh as *amicus curiae* is set forth in the preceding Motion for Leave to File.

SUMMARY OF ARGUMENT

When Congress legislated to empower the Executive Branch to undertake impartial investigation and prosecution of persons close to the President or the Attorney General, it acted not out of any extra-constitutional sense of practical necessity but out of a recognition that conflicts of interest could otherwise prevent the Executive Branch from carrying out its constitutional mission in a manner that would command the public confidence that mission requires. In doing so, Congress drew on two clear sources of power in the Constitution's text. *First*, the Necessary and Proper Clause of Article I empowers Congress to facilitate the faithful and credible execution of the law enforcement "Powers vested by this Constitution" in the Executive Branch "or in any . . . Officer thereof." See Part I-A. *Second*, the Appointments Clause of Article II expressly authorizes Congress to create an "inferior officer" charged with pursuing designated investigatory goals and, if Congress may "think proper," to place the appointment of that officer in the hands of the "Courts of Law." See Part I-B. The Necessary and Proper Clause read in conjunction with the Appointments Clause in turn authorizes Congress to secure the independence of that officer by forbidding her discharge without "good cause." See Part III.

The statute through which Congress has taken these steps comports fully with the separation-of-powers principles delineated by this Court: it neither works an impermissible aggrandizement of congressional power (see Part II) nor erodes the central powers, or compromises

the core functions, of the Judicial or Executive Branch. See Part III.

To endorse the novel course pioneered by the court below in striking the statute down is to embark upon an uncertain voyage partaking more of policy judgment than of principled adjudication, and imperiling the survival of the independent agencies. The Court should decline this invitation to replace Congress' considered judgments with its own on the subject of how best to avoid disabling conflicts of interest in the enforcement of federal law.

ARGUMENT

I. THE NECESSARY AND PROPER CLAUSE AND THE APPOINTMENTS CLAUSE EXPLICITLY EMPOWER CONGRESS TO PROVIDE FOR JUDICIAL APPOINTMENT OF A TEMPORARY INDEPENDENT COUNSEL TO INVESTIGATE PERSONS WHOSE PROSECUTION BY THE ATTORNEY GENERAL MAY ENTAIL A CONFLICT OF INTEREST.

A. The Necessary and Proper Clause Empowers Congress to Enact Conflict-of-Interest Laws That it Rationally Deems Would Facilitate the Faithful, Credible, and Impartial "Execution" of the Law Enforcement "Powers Vested By This Constitution" in The Executive Branch "or in Any . . . Officer Thereof."

The Necessary and Proper Clause provides explicit textual authority for Congress to enact an independent counsel statute that it rationally deems necessary to facilitate the credible operation of the Executive Branch, and a proper means, in particular, of freeing that branch from the taint and mire of disabling conflicts of interest.

Lost in most of the debate over the constitutionality of the independent counsel statute is the fact that the Necessary and Proper Clause is a source of congressional authority not simply to act pursuant to Congress' *own* enumerated powers, but also "to enact laws carrying into

execution the powers vested *in other departments* of the Federal Government," *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n.7 (1979) (emphasis added).[1] For although the Constitution's ratification established the grand design for a tripartite national government and laid its foundation, it left much work to be done. Executive departments and lower federal courts were envisioned but not created. Questions of staffing, resources, organization, and the allocation of responsibilities within the executive and judicial arms remained to be decided.

Defending the independent counsel statute as necessary to free the Executive Branch from conflicting loyalties that would otherwise imperil visibly impartial prosecution does not, as the court below would have it, App. 60a, entail advancing an *extra*-constitutional argument from practical necessity. At issue, rather, is the manifest duty and province of Congress to structure the operations of the coordinate branches of government, making provision for such incidental powers as in *its* view will promote the "faithful execution"—that is, the steadfast and credible implementation—of the missions the Constitution entrusts to the Executive Branch. "[W]ithout the substance of this power, the whole Constitution would be a dead letter." *The Federalist* No. 44 (J. Madison) (em-

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[1] Art. I, § 8, cl. 18 grants Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*" (Emphasis added). Thus *Missouri v. Holland*, 252 U.S. 416, 432 (1920), for example, upheld a statute regulating commerce in migratory birds, at a time when the Commerce Clause was narrowly construed, as ancillary to the President's discharge of his power to conclude a treaty on that subject. And in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825), Chief Justice Marshall located the authority of the federal courts to promulgate procedural rules solely in an act of Congress, which in turn was authorized solely by the second half of the Necessary and Proper Clause. *See also Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53-54 (1825). *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

phasis omitted). "Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose." *Myers v. United States*, 272 U.S. 52, 291-92 (1926) (Brandeis, J., dissenting).

That the Necessary and Proper Clause empowers Congress to create an office of independent counsel for cases in which the Attorney General has a conflict of interest follows from the universal recognition that prosecutorial conflicts of loyalty imperil not only good government in a political sense, but the faithful and credible discharge of the constitutional duties of the Executive Branch. It is a "basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof." S.Rep. No. 170, 95th Cong., 1st Sess. 6 (1977). Scrupulous adherence to this principle is particularly important for those attorneys who wield the power of government.[2] A federal prosecutor is "'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,'" *Young v. United States ex rel. Vuitton et fils*, 107 S.Ct. 2124, 2135 (1987) (citation omitted).

Legislation to assure that federal prosecution will be spared the problems caused by a clash of loyalties fits comfortably within the tradition of laws passed by Congress as necessary and proper to protect the integrity and the credibility of Executive Branch operations. Thus Congress has enacted laws criminalizing impersonation of a federal officer with intent to defraud,[3] and the re-

[2] *See, e.g., Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv.L.Rev. 1244, 1415-18 (1981).

[3] 18 U.S.C. § 912. *See United States v. Lepowitch*, 318 U.S. 702, 704 (1943) (quoting *United States v. Barnow*, 239 U.S. 74, 80 (1915)) (grounding § 912 in Congress' power "to maintain the general good repute and dignity of the [government] service itself") (brackets in original).

ceipt by government officers of political contributions from government employees.[4] Such statutes shield the Executive Branch from both actual and apparent corruption. Myriad conflict-of-interest laws have likewise been enacted to promote the fact and appearance of impartial law enforcement.[5] And the Judiciary Act of 1789, anticipating the problem of occasional conflicts of interest on the part of U.S. Marshals appointed with the advice and consent of the Senate, empowered federal courts to "specially appoint" a "fit person" to undertake the Marshal's duties temporarily when "the Marshal or his Deputy is not an indifferent person or is interested in the event of the cause."[6]

A disabling conflict of interest is most acute when a prosecutor is required to investigate those executive officials from whom her appointment derives and at whose pleasure she serves, for then the clash of interests imperils not only professional standards of ethics and the principle of impartial government, but the Executive's duty to take care that the laws be faithfully executed. It is *this* power which Congress, pursuant to the Necessary and Proper Clause, has aided. For even if a new officer should be selected by the Executive Branch to conduct the necessary investigation of high-level executive officials, there would remain the danger that the primary qualification of the prosecutor the Executive chose would be—or *seem* to be—that of "being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render [the appointee] the

[4] *See Ex parte Curtis*, 106 U.S. 371 (1882).

[5] *See Board of Governors v. Agnew*, 329 U.S. 441 (1947); *Young v. Vuitton*, 107 S.Ct. at 2135 & n.13 (18 U.S.C. § 208(a)).

[6] Judiciary Act of September 24, 1789, ch. 20, § 29, 1 Stat. 73 (1789); *id.* at § 28. The constitutional judgments of the First Congress are entitled to substantial weight since so many members of that body had been involved in the drafting and ratification of the Constitution. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

obsequious instrument[] of [the President's] pleasure." *The Federalist* No. 76 (Hamilton).

Nor need one assume, as the majority below suggests, either a "personally corrupt President," App. 62a, or the personal venality of prosecutors charged with investigating possible wrongdoing by their associates in the Executive Branch. Congress concluded after years of study that, " 'as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.' " H. Rep. No. 1307, 95th Cong., 2d Sess. 2 (1978) (quoting testimony of Prof. Cox). The problem addressed by the independent counsel statute is thus a fundamental, institutional conflict of interest that would otherwise undermine even the most incorruptible Executive's enforcement of the law. The majority below professed doubt that an Attorney General encounters a conflict of interest when asked to investigate his own deputies or the President's aides. App. 61a. But in the Iran Contra matter, Attorney General Meese himself displayed no such uncertainty: he "determine[d] that investigation . . . by [any] . . . officer of the Department of Justice may result in a . . . conflict of interest," § 591(c), and therefore *voluntarily* called for Independent Counsel Walsh's appointment pursuant to § 591(c).

It is often forgotten that such conflicts of interest may cut both ways. Conflicting loyalties may just as easily induce excessive prosecutorial zeal as undue sloth: "[i]t is just as bad for a man of honor to lean over backwards to avoid the imputation of bias as it is to be actually biased," *Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 372 (1973) (testimony of Prof. Freund).[7] A prosecutor charged

[7] Senator Levin, co-sponsor and floor manager of the Independent Counsel Reauthorization Act of 1987, P.L. 100-191 (Dec. 15, 1987), observed that "prosecutors facing such public skepticism may actually treat persons close to the President even more harshly than other criminal suspects just to escape any appearance of bias." 133 Cong. Rec. S15623 (daily ed. Nov. 3, 1987).

with investigating those for whom she works and those close to her superiors is thus poised between Scylla and Charybdis: the impulse to please those who hire and fire her may lead to a white-wash; the drive to demonstrate fearless impartiality may end in a witch-hunt. Moreover, the appearance of a conflict of interest is as damaging to public confidence in law enforcement, and in the administration of justice, as actual conflict itself. S. Rep. No. 170, 95th Cong., 1st Sess. 6 (1977); *Young v. Vuitton*, 107 S.Ct. at 2136-37.

Section 591(c) of Title 28 accordingly empowers the Attorney General to "apply for an independent counsel . . . if the Attorney General determines that investigation" of a particular individual "by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest."[8] Congress reasonably concluded that the public would have confidence in the impartiality of investigatory and prosecutorial decisions made by such an independent counsel, whereas the same decision made by an Attorney General who recognized that he had a conflict of interest, or the appearance thereof, would breed public distrust. S.Rep. No. 170, 95th Cong., 1st Sess. 7

[8] 28 U.S.C. § 591(c). Section 591(b) contains a list of high executive officials whose prosecution by the Attorney General or the Department of Justice beyond the preliminary investigation stage is conclusively presumed to create at least the appearance of a conflict of interest. This provision, like § 591(c), casts no aspersions on the integrity of any particular individual or office. In enacting § 591, Congress did as it has done in prior conflict-of-interest statutes, and "relied upon its general knowledge of human psychology," *United States v. Brown*, 381 U.S. 437, 454 (1965), in concluding that investigation of people in those named positions by *anyone* in the Department of Justice would raise the specter of a conflict of interest. The use of such conclusive presumptions in conflict-of-interest statutes has been approved by this Court. *See Board of Governors v. Agnew*, 329 U.S. 441 (1947); *United States v. Brown*, 381 U.S. at 453-54.

(1977).[9] Thus the concern of the court below that an independent counsel may be insufficiently sensitive to the policy considerations, foreign and otherwise, that would *properly* restrain an ordinary prosecutor is ironically misplaced:[10] it is precisely the independent counsel's

[9] This conclusion has been borne out: "[Independent counsels'] decisions [not to file criminal charges] have been accepted as fair and objective, and the vindication that targets . . . have rightfully claimed has not been tainted by allegations that the vindication was the result of a 'fix.'" 133 Cong. Rec. H8864-65 (daily ed. Oct. 21, 1987) (statement of Rep. Hughes).

[10] The majority below expressed particular fear that an independent counsel's decisions might conflict with the policies of the Executive Branch in "matters affecting international relations," App. 57a. But, as the dissent below correctly noted, "no . . . conflict with foreign policy has been identified in the present case, and there is no reason to suppose that problems that might arise cannot be handled by district court control on a case-by-case basis." App. 107a n.22. Independent Counsel Walsh, for example, has consulted with the State Department and other divisions of the Executive Branch with respect to foreign policy, national security, and other sensitive matters, consistent with the normal Department of Justice policy that the independent counsel statute binds independent counsels to follow "except where not possible." § 594(f). Just as federal judicial intervention into a hypothetical executive-legislative clash should await a ripe occasion for such intervention, *see Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring in the judgment), so the majority below erred in escalating a statement plucked from an oral argument on behalf of Independent Counsel Walsh in another case, App. 58a, into a basis for invalidating the independent counsel statute.

Similarly, the majority erred in extracting, from a preliminary text of remarks by Independent Counsel Walsh, App. 72a, a supposed inclination to prosecute whenever probable cause is established. As delivered, the speech by Mr. Walsh expressed no such inclination but, rather, stated the policy of this office in terms fully consistent with Justice Department Guidelines, *see* U.S. Attorneys' Manual § 9-27.220 (June 15, 1987). In any event, the history of practice under the statute amply demonstrates extraordinary restraint by those appointed to the office of independent counsel. Four of the seven publicly appointed independent counsels have found insufficient basis for prosecution, and every indictment sought by the remaining counsels has resulted in a conviction.

freedom from suspected favoritism that liberates her to give appropriate weight to these considerations.[11]

By removing the need to expunge any apparent taint, the use of a statutorily independent prosecutor thus enhances the credibility and integrity of federal law enforcement and simultaneously "serves to help protect the good name and reputation of innocent persons wrongly accused of crime." H.Rep. No. 1307, 95th Cong., 2d Sess. 2 (1978).[12]

Although the court below opined that the "conflict of interest" that Congress sought to combat in the Ethics in Government Act "is found in the Constitution itself," App. 65a, the Constitution, far from making such conflicts unavoidable short of impeachment or revolution,

[11] Whether an independent counsel's failure to do so could constitute "good cause" for discharge by the Attorney General under § 596(a)(1) is a patently unripe question that may never arise.

[12] Far from "weaken[ing] constitutional structures that serve to protect individual liberty," App. 10a, the independent counsel provisions invigorate them by removing an institutional conflict of interest. As this Court explained in *Young v. Vuitton*, the possibility that "prosecutors may on occasion be overzealous and become overly committed to obtaining a conviction. . . . 'does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration.'" 107 S.Ct. at 2138 n.18 (citation omitted).

When Congress reauthorized the independent counsel law in 1987, its review of investigations pursuant to the law revealed none of the abuses or vices which the majority below imagines. *See* S. Rep. No. 123, 100th Cong., 1st Sess. 8. "Clearly, the act has not generated runaway, overzealous prosecutors conducting star chamber proceedings." 133 Cong. Rec. H8864 (daily ed. Oct. 21, 1987) (statement of Rep. Hughes).

In any event, on the premise of the majority below that the "very independence" of an independent counsel denies fundamental fairness to those under investigation, App. 70a, there would be a fatal due process objection to the numerous state statutes providing for judicial appointment of temporary special prosecutors. *See, e.g.*, Ill. Rev. Stat. ch. 14, § 6; Idaho Code § 31-2602; Ga. Code Ann. § 24-2913; N.Y. County Law § 701.

not only avoids some disabling conflicts of interest from the outset (as in Art. I, § 6, cl. 2; Art. II, § 1, cl. 2), but also, in the Necessary and Proper Clause, endows Congress with the capacity to alleviate other conflicts as the need arises.

B. The Appointments Clause Expressly Authorizes Resort to Judicial Appointment.

1. *An independent counsel appointed at the request of the Attorney General and subject to removal for cause by the Attorney General is an "inferior officer" whose appointment Congress may "think proper" to "vest . . . in the Courts of Law."*

Even apart from the Necessary and Proper Clause, the Constitution contains the most explicit imaginable textual authority for the allocation of appointment power wrought by the independent counsel statute: "Congress may by Law vest the Appointment of such inferior officers, as they think proper, . . . in the Courts of Law . . . ." Art. II, § 2, cl.2. "The Constitution for purposes of appointment very clearly divide[d] all its officers into two classes." *United States v. Germaine*, 99 U.S. 508, 509 (1879). Under the standard delineated in *Germaine*, and reaffirmed in *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam), "inferior officers" are "officers inferior to those specially mentioned." *Id.* (quoting *Germaine*, 99 U.S. at 510). Those "specially mentioned" in the Appointments Clause are principal officers: "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court," and, of course, "those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments." *Collins v. United States*, 14 Ct.Cl. 568, 574 (1879).[13] Since the independent counsel does not fall into any of these categories, she is an "inferior officer."

[13] Much of the opinion below is devoted to attacking a parade of straw men—fashioned on the premise that department heads and lower court judges are inferior officers—such as the possibility of Congress vesting the appointment of all federal district court judges in the Attorney General. App. 13a, 38a-41a & n.32. Once it is recognized that such judges and cabinet secretaries are "specially mentioned" in the Appointments Clause and therefore not "inferior officers," these straw men scatter with the wind.

Moreover, the Constitution expressly grants to Congress the discretion to select "as they think proper" among the enumerated modes of appointment of inferior officers. Art. II, § 2. The court below maintains that there is "no authority" for reading this language to mean what it says. App. 23a n.20. But even if the Appointments Clause, despite its plain terms, did not constitute a "textually demonstrable constitutional commitment," *Powell v. McCormack*, 395 U.S. 486, 518 (1969), to Congress of the power to determine how officers other than those "specially mentioned" are to be appointed, it is certain that the clause, while listing the methods of appointment among which Congress may choose, provides no guidance whatever for judging whether Congress has made the wrong choice. *Cf. Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., joined by Burger, C.J., and Stewart and Stevens, JJ.) (Constitution's silence on "the manner in which" a branch is to participate in a governmental action renders dispute nonjusticiably political); *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

In any event, this Court provided all the authority anyone might require when it construed Art. II, § 2 to declare that "the selection of the appointing power, as between the functionaries named, *is a matter resting in the discretion of Congress.*" *Ex parte Siebold*, 100 U.S. 371, 397-98 (1879) (emphasis added). Justice Story long before explained that the wisdom of reposing this choice in Congress' discretion "cannot well be questioned. . . . It is difficult to foresee, or to provide for all the combinations of circumstances, which might vary the right to appoint in such cases." J. Story, 3 *Commentaries on the Constitution* § 1529 (1833).

The court below abandoned the bright line drawn in Art. II, § 2 between "specially mentioned" and "inferior" officers, preferring to pioneer a fuzzy "functional" test for determining whether an officer is inferior enough. App. 17a, 21a-23a. Whether an independent counsel is an inferior or a principal officer, it seems, turns on such factors as whether the independent counsel "has served for . . . as long as many cabinet officers," App. 22a, how many independent counsels "have been appointed under the statute" and are "in operation at the present," App. 23a, and even how many employees the counsel supervises. *Id.* Still more alarming is the court of appeals' repeated reference to what it perceives as the essentially partisan, political origins of both the independent counsel statute and the occasions of its use. App. 4a-5a, 62a-64a, 67a. It would be hard to imagine better examples of "criteria of decision that necessary escap[e] the judicial grasp," *Baker v. Carr*, 369 U.S. 186, 214 (1962). But even if the court of appeals' amorphous test were deemed to involve no political question, that court's approach nonetheless demonstrates the wisdom of the Framers in expressly providing for the appointment of inferior officers at Congress' discretion.

Although the court of appeals stops short of arguing that independent counsels "are themselves 'heads of departments,'" App. 23a, it insists that, whatever the independent counsel may be, she is too autonomous and august to be deemed an inferior officer. Even if one could accept the court's vague notion that the "depth," "breadth," and "magnitude of the [officer's] task . . . is constitutionally determinative," App. 23a, the independent counsel easily qualifies as "inferior." An independent counsel is appointed only at the request of the Attorney General. No such appointment can be sought unless and until the Attorney General, having completed his own preliminary investigation, § 592(c)(1), determines either that there is reason to investigate a possible federal crime by one of the senior executive officials listed in § 591(b), or—as in the case of Independent Counsel Walsh—that criminal investigation of a matter by the Attorney General or his subordinates might, in the Attorney General's own opinion, result in a conflict of interest. § 591(c). A decision by the Attorney General whether to ask for appointment of an independent counsel is final and unreviewable. § 592(b)(1) & (f); *Banzhaf v. Smith*, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984) (en banc) (per curiam).

Once appointed, the independent counsel's jurisdiction is restricted to a specific investigation of a particular set of acts and individuals. That limited, temporary, § 596(b), jurisdiction is defined by the appointing court, § 593(b), in reliance on the Attorney General's own application. § 592(d)(1). The court may not freely expand the jurisdiction of an existing independent counsel to include matters which the Attorney General has previously determined should not be pursued. *In re Olson*, 818 F.2d 34, 47-48 (D.C. Cir., Spec. Div., 1987) (per curiam). The independent counsel must comply with the established investigative and prosecutorial policies of the Justice Department "except where not possible." § 594(f). Most importantly, the Attorney General retains the power to remove the independent counsel for good cause. § 596(a)(1). To say that, despite this removal power, the independent counsel may not be deemed an officer "inferior" to the Attorney General flies in the face of this Court's explicit conclusion in *Bowsher v. Synar*, 106 S.Ct. at 3191, that the Comptroller General's removability for cause by joint resolution of the House and Senate renders that officer "subservient to Congress." [14]

[14] This also disposes of the argument—really more of a play on words—that the independent counsel cannot be an "inferior" officer unless she is "subordinate to a principal officer." App. 17a. This Court has never held that an inferior officer must be removable at will by some superior. In any event, the court below relies far too much on the term "inferior." At the time the Constitution was written, the primary meaning of "inferior" was lower in place,

Finally, both *United States v. Nixon*, 418 U.S. 683 (1974), which approved the Attorney General's appointment of the Watergate Special Prosecutor, and *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S.Ct. 753 (1988), which upheld Independent Counsel Walsh's parallel appointment by the Attorney General, confirm that a person possessing all the powers and duties of a statutory independent counsel can be named by a head of department without Senate confirmation, and therefore *must* be an inferior officer. In each case, the regulations promulgated by the Attorney General committed the Executive Branch to preserving the independence of the special prosecutor. *United States v. Nixon*, 418 U.S. at 696; 28 C.F.R. §§ 600.1 & 600.3 (1987). The only answer by the court below to this argument, App. 18a-19a n.17, is that such an independent counsel is "inferior" only because the Attorney General's power to revoke "at any time" the regulation creating that counsel's office renders the officer's independence illusory and makes the Attorney General's promise not to discharge or interfere with such a counsel "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). This argument manifests an unwarranted distrust of the Executive. It cannot be that the Executive Branch complied with Article II in these cases by making a promise with its fingers crossed—that a mental reservation can somehow make an otherwise unconstitutional arrangement comport with the separation of powers.

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rank, or station. "Subordinate"—the meaning used by the court of appeals, App. 16a-18a—was the least common usage of "inferior." S. Johnson, *A Dictionary of the English Language* (1785).

2. Objections to the inter-branch character of an appointment do not render the Appointments Clause unavailable, but raise questions properly addressed solely in terms of whether any separation-of-powers prohibition is violated.

The opinion below concedes that the language of the Appointments Clause permits inter-branch appointments, App. 30a, but the majority of the panel was offended by the prospect that a principal officer of one branch of government might be empowered to appoint an inferior officer of another. App. 29a-42a. Lines of appointment power on the federal organizational chart, it would seem, must be vertical within each branch; diagonals are not permitted. But the Appointments Clause does not enact the principles of Euclid or the preferences of Mondrian. However aesthetically appealing it might be for Congress to vest the appointment of inferior officers only in the branch or department "to which the duties of such officers appertain . . . *there is no absolute requirement to this effect in the Constitution . . . .*" *Ex parte Siebold*, 100 U.S. at 397 (emphasis added).

The court below struggled to evade *Siebold's* endorsement of inter-branch appointments by arguing that the judicially appointed election supervisors whose authority was upheld in that case did not perform typical executive functions. App. 36a-38a. Yet it was alleged in *Siebold*, and the Court assumed for the sake of argument, that the supervisors' duties were "entirely executive in their character." 100 U.S. at 397. Those duties included the power to "prevent fraudulent registration and fraudulent voting," "to keep the peace, to "preserve order," and to "arrest and take into custody, with or without process, any person . . . who shall commit any offense against the laws of the United States." Act of Feb. 28, 1871, ch. 99, § 8, 16 Stat. 436.[15]

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[15] A review of the relevant history and documents reveals that the Framers saw nothing inappropriate in inter-branch appointments in general. Several of the state constitutions that were praised by

Having brushed aside the holding in *Siebold*, the court below seizes on dictum in that case to fashion a sweeping "incongruity" test for inter-branch appointments: "it must be incongruous if an officer of one branch is authorized to appoint an officer of another branch who is assigned a duty central to the constitutional role of that other branch." App. 38a. *Compare Siebold*, 100 U.S. at 398. Since the court of appeals assumed enforcement of the criminal law to be an exclusive and cardinal executive function, App. 29a, 42a—a dubious assumption in historical terms—its incongruency analysis would dictate the opposite result in *Siebold*. Application of this standard would likewise overturn those cases where this Court has upheld judicial appointment of inferior officers " 'learned in the law' " who are charged with arresting, imprisoning, and prosecuting those who criminally coerce voters, *United States v. Allred*, 155 U.S. 591, 594 (1895) (citation omitted); or "institut[ing] prosecutions under laws relating to the elective franchise and civil rights," *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 353 n.2 (1931) (United States commissioners); or en-

The Federalist Papers as models for the judicial structure chosen by the Framers, *see The Federalist* No. 81 (Hamilton), provided that the state's supreme court, *see* Ga. Const. of 1777, Art. XI, or legislature should appoint the state's attorney general, *see* Va. Const. of 1776; S.C. Const. of 1778, Art. XXIX; N.C. Const. of 1776, Art. XIII. Members of the First Congress considered vesting the power to appoint federal prosecutors in the district courts. *Documentary History of the First Federal Congress, 1789-1791*, 5 *Legislative Histories* 1193-94 (C. Bickford & H. Veit, eds., 1986) (Senate Bill 1). As the dissenting opinion below points out, App. 35a n.41, the argument that this mode of appointment was rejected as unconstitutional is entirely speculative. In any event, that same Congress provided, as part of the Judiciary Act of 1789, for the special appointment by the courts of temporary U.S. Marshals—law enforcement officers within the executive branch, *Siebold*, 100 U.S. at 397; *Pennsylvania Bureau of Correction v. United States Marshals Service*, 106 S.Ct. 355, 358 n.1, 359 (1985)—when the regularly appointed Marshal could not fulfil his duties due to a conflict of interest. See text accompanying note 6, *supra*.

forcing extradition treaties with foreign governments, *Rice v. Ames*, 180 U.S. 371, 377-78 (1901).[16]

The "incongruity" test as articulated by the court of appeals provides little guidance. *Siebold* itself refused to place much emphasis on labels like "executive" and "judicial" when dealing with inferior officers, because of its recognition that "it would be difficult in many cases to determine to which [branch] an office properly belonged." 100 U.S. at 397.[17] By interjecting its incongruency analysis into the Appointments Clause, the court of appeals thus once again offers a wholly indeterminate subjective test. An impressionistic conclusion that the "Act considered as a whole thus strikes us" as unconstitutional, App. 60a, cannot suffice to sustain the judgment below. We suggest a return to this Court's extensively delineated separation-of-powers analysis: an inter-branch appointment should be deemed an unconstitutional "incongruity" only if it permits congressional self-aggrandizement, see Part II, *infra*; deforms a coordinate branch, see Part III-A, *infra*; or threatens the core functions of a coordinate branch, see Part III-B, *infra*.

II. THE INDEPENDENT COUNSEL STATUTE IS NOT AN IMPERMISSIBLE AGGRANDIZEMENT OF CONGRESSIONAL POWER.

The court below concedes that the Framers' central separation-of-powers concern was "that the "Legislative

[16] The force of these precedents cannot be deflected by pointing out that U.S. Commissioners have often been described not as executive officials but as "officer[s] of the district court," *Go-Bart*, 282 U.S. at 354, or as "adjunct[s] of the court," *Grin v. Shine*, 187 U.S. 181, 187 (1902), any more than it advances the position of the court below to label the election supervisors in *Siebold* as legislative officers. App. 36a. No matter what label one chooses, the conclusion is inescapable that Congress' power to repose appointment of prosecutors and law enforcement officials in the courts has been consistently upheld for over a century.

[17] The *Siebold* Court noted that a marshal, although "an executive officer," is also "pre-eminently the officer of the courts," 100 U.S. at 397. The same is true of all prosecutors. See Part III-A, *infra*.

Branch . . . will aggrandize itself at the expense of the other branches." App. 66a (quoting *Bowsher v. Synar*, 106 S.Ct. 3181, 3189 (1986)). It is this very concern that plainly animates the modern renaissance of separation of powers doctrine. This Court has turned back attempts by Congress to concentrate executive power in itself by usurping the authority to appoint executive officers, *see Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam); to remove them, *see Bowsher v. Synar*, 106 S.Ct. at 3188; *Myers v. United States*, 272 U.S. 52, 161 (1926); or to retain a veto over how they execute the law, *see Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

In apparent recognition of the fact that congressional self-agrandizement underlay each of this Court's recent separation-of-powers decisions, the court below strains to see legislative overreaching where none exists. Congress has given itself no role at all in appointing, removing, or supervising an independent counsel.[18] The majority is reduced to observing that, even though "Congress' role under the Act is limited to a non-binding call for the appointment of an independent counsel and the right to receive reports from that office," App. 66a, the Act nevertheless "alters the political equation" because "repeated calls for the appointment of a statutory independent counsel may, like a flicking left jab, confound the Executive Branch," App. 67a. But Congress' role under the Act is surely more passive than pugilistic—and, in any event, the Presidency does not have the institutional glass jaw the majority below imagines. The separation of powers is no more threatened when Congress suggests an independent investigation of high executive officials than when Congress questions or criticizes those officials in its hearing rooms.

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[18] The Act's reporting and oversight requirements are clearly constitutional. *See INS v. Chadha*, 462 U.S. at 955 n.19 (imposition of "formal reporting requirements" on administrative agencies "lie[s] well within Congress' constitutional power").

Perhaps sensing how feeble this showing of supposed legislative aggrandizement truly is, the court below paints the separation of powers as some sort of zero-sum game: "whether or not Congress can actually exercise subtle influence over" an independent counsel, "Congress' political power must necessarily increase vis-a-vis the President," App. 67a, since the Executive Branch does not select the independent counsel—even though it retains the power to remove her for cause or not to seek her appointment in the first place. That is a conclusion, not an argument. In fact, by reposing authority to appoint independent counsels in the courts—thereby foregoing the Senate's opportunity to provide "advice and consent"—Congress has acted to diminish, rather than augment, its own powers.

Where, as here, a case "raises no question of the aggrandizement of congressional power at the expense of a coordinate branch," *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245, 3261 (1986), "the proper inquiry focuses on the extent to which [the challenged law] prevents the [coordinate] branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). *See also Schor*, 106 S.Ct. at 3258; App. 103a-04a (dissenting opinion).

III. THE INDEPENDENT COUNSEL STATUTE DOES NOT ERODE THE CENTRAL POWERS, OR COMPROMISE THE CORE FUNCTIONS, OF THE JUDICIAL OR EXECUTIVE BRANCH.

A. The Responsibilities This Statute Assigns to the Judiciary Protect Its Integrity Without Calling Upon It to Perform Any Task Incompatible with Its Article III Role.

The expansive grant of "[t]he judicial Power" in Article III, § 1, has always been understood to encompass inherent judicial authority to preserve the integrity of

the judicial process by policing the officers of the court, be they prosecutors or defense attorneys, for conflicts of interest.[19] Congressional enactments under the Necessary and Proper Clause to effectuate this judicial power to prevent or remedy conflicts of interest on the part of officers of the court began with the First Congress.[20]

By empowering the Attorney General to request the judicial appointment of an independent counsel in cases of conflict, § 591(c) merely adds to these safeguards a prophylactic measure that minimizes the need for later judicial intrusion into the prosecutorial function by removing at the outset actual or apparent taints on its exercise. At the same time, § 591(c) reduces the risk that the Article III courts' role in adjudicating genuinely adversary "cases" or "controversies" will be subverted by feigned or collusive prosecutions of presidential aides or allies by friendly executive attorneys. Instructive in this regard is this Court's conclusion, in *United States v. Nixon*, 418 U.S. 683 (1974), that it would "gravely impair the role of the courts under Art. III . . . . if judgments were to be founded on a partial or speculative presentation of the facts," *id.* at 707, 709. If "[t]he very integrity of the judicial system and public confidence in the system," *id.* at 709, depend on assurance that the

[19] *See Young v. Vuitton*, 107 S.Ct. at 2135-36 (courts have supervisory power to prohibit appointment of interested counsel to prosecute a contempt citation); *In re Grand Jury Subpoena*, 781 F.2d 238, 251 (2d Cir. 1985) ("courts have the power and the duty to disqualify defense counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right"), *cert. denied*, 475 U.S. 1108 (1986).

[20] The Judiciary Act of 1789 empowered the federal judiciary to "specially appoint" a temporary U.S. Marshal when the presidentially appointed Marshal had a conflict of interest in a particular case. See text accompanying note 6, *supra*. More recently, Congress approved Federal Rule of Criminal Procedure 44(c), which requires district courts to inquire into all instances of multiple representation of criminal defendants and to "take such measures as may be appropriate" unless "it appears that there is good cause to believe no conflict of interest is likely to arise."

prosecution is neither pulling its punches to protect its friends nor hounding a hapless public servant to preserve its image, it follows that legislation to protect the Article III courts from being transformed into stages for such displays, far from distorting the constitutional function of those courts, in fact shields that function from the perversions that attend conflicts of interest.[21]

The argument that the specific powers conferred on the courts by the independent counsel statute are nonetheless incompatible with Article III insofar as they require the performance of tasks other than the resolution of "cases" or "controversies" misreads Article III, § 2. The enumeration of "cases" and "controversies" to which "[t]he judicial Power shall extend" merely recites the nature of the *disputes* that Article III courts may resolve. Plainly, the express terms of the Appointments Clause refute the suggestion that for any power to be properly exercised by an Article III court it must first be found to entail resolution of "cases" or "controversies." For the Appointments Clause expressly authorizes Congress to vest "in the Courts of Law" the power to appoint inferior officers —a power that *necessarily* entails actions outside "the context of a case or controversy." App. 79a. Read in conjunction with the Appointments Clause, the Necessary and Proper Clause manifestly permits Congress to give the federal courts those incidental powers that are appropriate to effectuating the purposes served by such an appointment—including the power to "define [the] independent counsel's prosecutorial jurisdiction," § 593(b).

Indeed, the tasks assigned to the Special Division under the Act are paradigmatic examples of powers "Neces-

[21] During the Watergate affair the Assistant Attorney General who was ostensibly in charge of the investigation discussed the matter with presidential aides and "served as a conduit for a constant flow of information from the grand jury and the prosecutors first to [John] Dean and then to the President." *Final Report of the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 2d Sess. 80 (1974).

sary and Proper" to make meaningful Congress' Article II authority to vest appointment power in the federal courts. Without the ability to review petitions concerning the independent counsel's jurisdiction, § 594(e), the appointment power could be undermined either by an independent counsel too timid to act as needed or by one insensitive to the boundaries of the jurisdiction conferred in that counsel's appointment.[22] The requirement that the Attorney General possess good cause for removal prevents the vesting of power in the Special Division from becoming a dead letter, with any appointment voidable at the whim of the Executive from the moment it is made. *Cf. United States v. Perkins*, 116 U.S. 483, 485 (1886). The provision for termination of the office by the Special Division once its purposes have been fully discharged, § 596(b)(2), is an appropriate housekeeping measure ensuring an orderly end to an inherently temporary appointment.[23] And, contrary to the thrust of the opinion below, App. 85a, the Act surely does not call upon the Special Division to act as both judge and prosecutor. For any

[22] The majority below notes that in the Iran/Contra investigation the Special Division defined Independent Counsel Walsh's jurisdiction to include more subjects than were mentioned in the Attorney General's application. App. 78a. The majority's intimations of partisan political motivation, App. 78a-79a, are made without record support and should be dismissed as speculation that adds nothing to the constitutional analysis.

[23] The suggestion by the court below that the power of the Special Division to terminate the office when its business is done somehow enables that body "to control the pace and depth of the independent counsel's activities," App. 82a, is altogether implausible. Congress carefully distinguished between the Attorney General's removal power, which turns on the "conduct of the [independent counsel]," and the Special Division's formal termination duty, which turns on the "state of the investigation." S.Rep. No. 170, 95th Cong., 1st Sess. 75 (1977). Any supposed incompatibility between the judicial function and the task of formally concluding an investigation poses no currently ripe controversy. *Cf. Bowsher v. Synar*, 106 S. Ct. 3181, 3211-14 (1986) (White, J., dissenting); *id.* at 3215 (Blackmun, J., dissenting).

prosecutions the independent counsel may bring would not be heard before the judges who appointed her, nor would the Special Division hear an appeal from any action she may bring challenging her dismissal.[24]

B. Rather Than Eroding the Executive's Central Role in Law Enforcement, The Statutory Guarantee That a Judicially Appointed Independent Counsel May Be Removed by the Attorney General Only For Cause Facilitates the Executive's Ability to Discharge Its Investigative and Prosecutorial Duties Faithfully and Credibly.

By permitting the Attorney General to remove an independent counsel only for "good cause," § 596(a)(1), the independent counsel statute enables the counsel to exercise independent prosecutorial judgment, uncompromised by conflicting loyalties or fears of reprisal, and untainted by any public doubt as to the impartiality of that judgment. A regulation that, as the court below sees it, can be modified or revoked "at any time," App. 18a, does not solve either the conflicts problem or its public perception.

The independent counsel statute gives the President and the Attorney General a way to tie their hands without leaving them the option of wriggling free by repealing the regulation and summarily dismissing the independent counsel. If Odysseus can always free himself

[24] Congress' 1987 amendments to the Act provide that removal may be reviewed by the district court. 28 U.S.C. § 596(a)(3) (as amended Dec. 15, 1987). This is unexceptional: the allegedly unlawful dismissal of a federal officer may routinely be reviewed in federal court pursuant to the Administrative Procedure Act, 5 U.S.C. § 701-06. *See also Myers*, *Wiener* and *Humphrey's Executor*, discussed *infra*. Since the Special Division's power to review the independent counsel's removal by the Attorney General has been repealed, challenges to that feature of the Act—which cannot be shown to have affected any power ever exercised by any independent counsel—are obviously moot. To say this view "sales directly into the *Bowsher* wind," App. 43a-44a n.36, is to read *Bowsher* as overriding the case-or-controversy requirement of Article III.

from the mast, the song of the Sirens remains an unavoidable distraction. By empowering the Attorney General to obtain the services of an independent counsel whenever *he* judges that further investigation by the Department of Justice would entail a conflict of interest, § 591(c) performs for the Executive Branch the service Odysseus was done, at his request, when his sailors bound him to the mast as their ship approached the Siren's rocks.[25] This freedom to bind oneself in order to accomplish one's goal—the truly faithful and uncompromised execution of the law—no more invades the autonomy of the Executive than the law of contract invades the autonomy of the individual. Because the Attorney General retains the unreviewable power to decide *not* to trigger appointment of an independent counsel, this statutory contract is an offer the Executive Branch is always free to refuse.

The majority below saw the matter differently, concluding that criminal prosecution is so quintessentially an executive function that it may constitutionally be performed only by officers under the President's direct supervision and subject to dismissal without cause. App. 42a-43a. A parallel argument about inalienable executive functions was tendered by the Solicitor General in *Bowsher v. Synar* and rejected by the Court. 106 S.Ct. at 3188-89 & n.4; *id.* at 3206 (White, J., dissenting). No member of this Court there disagreed with the "long-standing recognition that it is within the power of Congress under the 'Necessary and Proper' Clause, Art. I, § 8, to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control." *Id.* at 3206 (White,

[25] Section 591(b) achieves the same result by conclusively presuming that investigation of certain executive officials entails a conflict of interest. The Attorney General's determination that no investigation is warranted by the evidence is, of course, the final word. § 592(f).

J., dissenting). This Court's cases have distinguished between those officers whose functions make them the Executive's own subordinates and "those whose tasks require absolute freedom from Executive interference." *Wiener v. United States*, 357 U.S. 349, 353 (1958). *See also Humphrey's Executor v. United States*, 295 U.S. 602, 625-26, 628 (1935).[26]

The majority below tries to confine the rule of *Humphrey's Executor* to officials with "quasi-legislative or quasi-judicial powers," declaring that the rule has no application to "purely executive officers" such as an independent counsel charged with going to court to enforce the law. App. 45a-46a. But the Federal Trade Commissioners whose independent tenure was upheld in that case were similarly charged with investigating antitrust violations, filing complaints stating the charges, and going to court to enforce cease-and-desist orders. *Humphrey's Executor*, 295 U.S. at 620-21; Federal Trade Commission Act, ch. 311, 15 U.S.C. §§ 45, 46, 49, 50, 38 Stat. 717 §§ 5, 6, 9, 10. *See also Bowsher*, 106 S.Ct. at 3207 n.3 (White, J., dissenting).[27] Like the independent counsel here, the Commissioners were obliged to "act with entire impartiality" and "charged with the enforcement of no policy except the policy of the law." *Humphrey's Executor*, 295 U.S. at 624.

[26] In *Humphrey's Executor*, the Court traced this "sharp line of cleavage," *Wiener*, 357 U.S. at 353, to the distinction made in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803), between "heads of departments [who] are the political and confidential agents of the executive, merely to execute the will of the President," and officers to whom "a specific duty is assigned by law, and [where] individual rights depend upon the performance of that duty." The latter, the Court held, are "officer[s] of the law." *Id. See Humphrey's Executor*, 295 U.S. at 631.

[27] The United States Commissioners whose authority was sustained in *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), were likewise charged with "institut[ing] prosecutions under laws relating to the elective franchise and civil rights," *id.* at 353 n.2, and were "subject to removal by the court appointing them." *Id.* at 353 (citing 28 U.S.C. § 526 (1925)).

Perhaps sensing the futility of this effort to escape *Humphrey's Executor*, the majority below strives to distinguish the Federal Trade Commissioners from an independent counsel on the ground that the former may be given law enforcement duties only because they play a significant role in defining the substantive content of the statutes they enforce, whereas the independent counsel has no role in giving shape to pre-existing federal criminal law. App. 49a-50a. But surely, if a measure of independence from executive control is the alleged constitutional vice—which supposedly threatens the rights of criminal suspects—it could not solve the problem to give an independent law enforcement officer the additional power to define and clarify the offenses to be prosecuted. Whatever one thinks of Justice Jackson's colorful conclusion that independent agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking," *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (dissenting opinion), it is hard to credit the suggestion that the independent counsel statute runs afoul of the separation of powers because it is structured to *minimize* such "derangement."

Since it cannot be reconciled with *Humphrey's Executor*, the decision below threatens the constitutional viability of the FTC, the Federal Reserve Board, and the other independent agencies whose duties include not only enforcing the law in the courts but also making and "executing" federal policy in ways that have enormous national impact—but whose members, like an independent counsel, can be removed only for good cause.[28] Surely this Court did not take pains to avoid that result in

[28] The good cause removal standard was drawn from the tenure provisions of the independent agency laws and added to the independent counsel statute in 1982 at the suggestion of the Department of Justice with the express purpose of ensuring the Act's constitutionality. S.Rep. No. 496, 97th Cong., 2d Sess. 17 (1982).

Bowsher v. Synar, 106 S.Ct. at 3188-89 & n.4, only to accept it here.

Even if one assumes that criminal law enforcement is by nature an "executive" function, one may still doubt that the Faithful Execution Clause precludes giving any such enforcement duty—however temporary, episodic, and focused—to an officer who can be removed by the Attorney General only for cause.[29] That clause speaks not of criminal law enforcement per se but of execution of the law, in all its manifold forms, as distinguished from the enactment or adjudication of the laws. Moreover, the clause indicates the Framers' intent to guide, not to expand executive power.[30] It is thus more a source of constitutional duty than a grant of exclusive and illimitable authority.[31] Whatever the clause means with respect to

[29] In contrast to the President's responsibilities with respect to the military, foreign affairs, and the granting of pardons, Art. II, § 2, the prosecutorial function is not specifically mentioned in the Constitution. App. 108a (dissenting opinion). In describing officers who must serve at the President's pleasure because "their acts are his acts," Chief Justice Marshall gave as an example those officers who conduct foreign affairs. *See Humphrey's Executor*, 295 U.S. at 630-31 (discussing *Marbury v. Madison*). The majority below may accordingly be on firmer ground in supposing that Congress could not make all foreign policy and diplomatic officials below the Secretary of State judicially appointed officers removable only for cause. App. 40a. But the extrapolation from foreign affairs to law enforcement entails a vast leap.

[30] In reaction to the excesses of the deposed King James II, Parliament declared in the first article of the English Bill of Rights that "the pretended Power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal." W. & M., Sess. 2, c.2 (1689). This requirement of royal "Execution of the Laws" is the apparent source of our own Faithful Execution Clause. *See* Reinstein, *An Early View of Executive Power and Privilege: The Trial of Smith and Ogden*, 2 Hastings Const.L.Q. 309, 320-23 & n.50 (1975).

[31] *See* Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum.L.Rev. 353, 384 (1927) ("The language of duty rather than of power was employed advisedly in this clause").

an executive obligation to enforce the laws, such an obligation plainly does not require limitless removal power and surely does not leave the President's choice of means for enforcing the law unfettered. The constitutional command that the President "take Care that the Laws be faithfully executed" resonates in the removal power context as a negative principle: it requires that those with executive functions have a measure of independence from the other branches, not necessarily a degree of dependence upon the President. Compare *Myers* and *Bowsher*, where congressional participation in removal was invalidated, with *Humphrey's Executor* and *Wiener*, where a degree of insulation from presidential removal was upheld. *See also Synar v. United States*, 626 F.Supp. 1374, 1391 (D.D.C.) (3-judge court) (per curiam) (executive powers "cannot be conferred upon an officer who lacks the degree of independence from Congress that their exercise constitutionally requires"), *aff'd*, *Bowsher v. Synar*, 106 S.Ct. 3181 (1986).

In an effort to lodge the prosecutorial power firmly in the Faithful Execution Clause, the majority below turns to history, positing that "the Framers must have foreseen the necessity of officers of the United States commissioned to enforce federal criminal law," and deeming it "inevitable that under the Constitution such officers must be . . . subject to the control of the President." App. 52a. Yet the First Congress discerned no constitutional difficulty in reposing the appointment of federal marshals and prosecutors in the district courts.[32] And, even though Congress ultimately decided to provide for their appointment by the President and the Senate, the original part-time, fee-for-service federal prosecutors remained virtually autonomous.[33]

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[32] See note 6 and accompanying text and note 16, *supra*.

[33] *See* L. White, *The Federalists: A Study in Administrative History* 406-08 (1948). "Contacts between the district attorneys" and the federal government in the capital were "largely fortuitous." *Id.* at 408. This situation contrasted starkly with the degree of

Unable to extract a convincing argument for unbounded presidential removal power over all law enforcement officials from the Constitution's text or from the Framers' own vision of the prosecutorial power, the majority below makes its last stand on the "concept of a responsible and accountable unitary executive," App. 29a. But as the panel's own discussion makes plain, App. 27a, the Constitution's adoption of a unitary rather than a plural executive was a rejection, at the apex of the federal hierarchy, of governance by a "council of state" or by parliamentary ministers. That overarching organizational principle hardly buttresses the court of appeals' conclusion about the contours of presidential power to remove a temporary special prosecutor.

The most troubling aspect of the court of appeals' "unitary executive" argument is its notion of accountability. The court's ideal seems to be a world in which the President must remain "the visible target" for public outrage whenever a particular prosecutorial decision "is contrary to the mores and customs of the community," App. 27a. But it is one thing to say that a President cannot, by use of "anonymous directorates" or "impenetrable bureaucracies," *id.*, escape responsibility for the conduct of his subordinates, and another to say that the President has a constitutional obligation to *embrace* a conflict of interest—inimical both to his faithful execution of the law and to his subordinates' rights—when the conduct of those subordinates is questioned.

As this Court has often recalled, "[t]he men who met in Philadelphia in the summer of 1787 were practical

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control the Executive maintained over foreign affairs: "Unlike the consuls, for example, the district attorneys apparently received no standard instructions, nor did they render annual or other regular reports." *Id.* Presidential control of law enforcement was further diluted by the routine resort of federal departments and local officers alike to the hiring of private attorneys as "special counsel" to prosecute the government's causes. *Id.* at 407, 409; H. Cummings & C. McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 225, 229 (1937).

statesmen, experienced in politics," *Buckley v. Valeo*, 424 U.S. at 121. They were also men of great and subtle imagination. It simply cannot be that, having endowed Congress with the flexibility and versatility to meet unforeseen challenges—so that this constitutional order might endure for the ages—the Constitution now requires this Court to abrogate a law responsibly enacted to address a recurring conflict-of-interest quandary that inheres not in the Constitution itself, but in human nature. The dilemma of conflicting loyalties that arises when a President and his Attorney General are required to prosecute their subordinates is not some Homeric tragic flaw that the Executive Branch must abide, though it lead to its destruction, nor is it a bitter cup that cannot be taken from the Executive's lips. As Justice Brandeis noted in his dissent in *Myers v. United States*, "if . . . adequate means are denied to the President, the fault will lie with Congress." 272 U.S. at 292. Here, Congress has provided the means.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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March 9, 1988

No. 87-1279

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS
and CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR ADDITIONAL TIME FOR ORAL ARGUMENT AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT BY LAWRENCE E. WALSH, INDEPENDENT COUNSEL, AS AMICUS CURIAE

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March 18, 1988

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MOTION FOR ADDITIONAL TIME FOR ORAL ARGUMENT AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT BY LAWRENCE E. WALSH, INDEPENDENT COUNSEL, AS AMICUS CURIAE

Lawrence E. Walsh, Independent Counsel, respectfully moves for one hour of additional oral argument time in the above-captioned case now scheduled for argument on Tuesday, April 26, 1988, pursuant to Rule 38.3 and Rule 42, and for leave to argue orally for 15 minutes of that additional hour, pursuant to Rule 38.7. Mr. Walsh has separately filed a motion to file a brief *amicus curiae* and a brief *amicus curiae* in this case, and has conferred with

appellant Morrison, who will be moving separately for additional oral argument time but has withheld her consent to sharing such time with Independent Counsel Walsh.

I.

In support of his motion for one hour additional oral argument time, Mr. Walsh submits that the importance and complexity of the issues in this case and the public interest in their correct resolution warrant such additional time, just as an additional hour was granted for oral argument in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), and in *INS v. Chadha*, 462 U.S. 919 (1983). In those cases, as in this one, the Court was asked to hear multiple arguments on matters bearing on the separation of powers; the instant case as clearly warrants a full additional hour. Finally, Mr. Walsh understands that only three hours of argument have been scheduled for April 26, so that the hour requested herein could be added within the constraints of the Court's current schedule.

II.

In addition, Mr. Walsh seeks leave to participate in oral argument through his counsel of record because application of the independent counsel statute in the Iran/Contra matter raises issues which are distinct to this independent counsel and may well be affected by the disposition of this appeal but which were not addressed by the court below, are not directly implicated by the investigations conducted by Independent Counsel Morrison or any other independent counsel, are not discussed by appellant or by any of the other *amici* filing in support of appellant, and thus may not be fully and fairly canvassed unless such participation by this independent counsel in particular is allowed.

1. The independent counsel statute contains two distinct criteria pursuant to which the Attorney General

may initiate the appointment of an independent counsel: 28 U.S.C. § 591(b) requires the appointment of an independent counsel in certain matters involving specified high government officials, while 28 U.S.C. § 591(c) provides that the Attorney General "may" call for an independent counsel in other matters "if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest." The instant appeals relate to an independent counsel appointed under § 591(b), while Mr. Walsh was appointed under § 591(c). He is the *only* independent counsel so appointed since the enactment of the statute in 1978 and is therefore in a unique position to address the significance of § 591(c) both in itself and in its implications for the Act as a whole.

2. The majority opinion below drew no distinction between independent counsel appointed under § 591(b) and those appointed under § 591(c). Yet both sections would succumb if the lower court's wholesale invalidation of the statute were upheld, inasmuch as neither section conforms to the demand of the court of appeals that all federal investigations and prosecutions be conducted by presidential appointees who serve at the will of the President. In neglecting to analyze or even acknowledge the difference between the two sections, the court below failed to recognize an important argument in favor of upholdng the statute as a whole—an argument perhaps less apparent when attention is focused on § 591(b). When the Attorney General relies upon § 591(c) in initiating the appointment of an independent counsel as he did in the Iran/Contra matter, the appointment of such a counsel is in no sense compelled by the independent counsel statute, but rather represents a voluntary decision by the Executive Branch to avail itself of the mechanism provided by that statute to guarantee the independence and integrity of a specific criminal investigation as to which

the Department of Justice may have a conflict of interest. The statute thus spares the Attorney General from supervising prosecutions in cases in which he himself acknowledges a conflict of interest. A statute that facilitates the credible functioning of the Executive Branch in this manner is harder to dismiss as intruding fatally upon the prerogatives of the Executive than it might be if the statute's facilitative role were less apparent.

3. Indeed, it is primarily by analyzing the role of the independent counsel statute in facilitating the impartial and credible discharge of the Executive's law enforcement functions, rather than by concentrating solely on whether the statute impermissibly intrudes upon the Executive, that one can most readily appreciate (a) the analogy between the independent counsel statute and other forms of conflict-of-interest legislation, and (b) the textual basis for all such legislation as a means of "carrying into Execution" the law enforcement "Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18 (Necessary and Proper Clause).

4. Mr. Walsh's participation in oral argument would also assist the Court in its consideration of this case because, unlike Independent Counsel Morrison, Mr. Walsh received a parallel appointment as Independent Counsel in the Iran/Contra matter pursuant to the Attorney General's independent counsel regulation, 28 C.F.R. §§ 600, 601 (1987).* Mr. Walsh is thus in a position to address directly the claim that the prospect of *ad hoc* appointment as independent counsel in the Department of Justice by the Attorney General, with solely regulatory rather than statutory tenure, solves the problems to which the independent counsel statute is addressed.

* Even though the validity of Mr. Walsh's parallel appointment has been upheld, *see In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S.Ct. 753 (1988), it is already apparent that the attacks on Mr. Walsh's authority in the Iran/Contra matter will continue unless and until the independent counsel statute is definitively upheld. For example, the Reply Brief of Petitioner in *North v. Walsh*, No. 87-1094, in which this Court denied certiorari on on February 22, 1988, 56 U.S.L.W. 3569, states (at p. 2) that "[t]he authority of respondent Walsh has not, however, been 'definitively upheld.'"

5. Moreover, the majority below made several explicit references to foreign policy and other supposed implications of the investigation by Independent Counsel Walsh, *see* App. 57a-58a, 72a-73a, 78a-79a, 80a-81a, even though none of the information relied upon by Judge Silberman in that regard was part of the record of this case.

6. Lacking any opportunity to file a reply brief to respond to whatever arguments are advanced in opposition to the perspective taken in the *amicus* brief of Independent Counsel Walsh, Mr. Walsh may be able to provide "assistance to the Court not otherwise available." Rule 38.7, if his office is granted leave to participate in the oral argument of this case.

CONCLUSION

For the foregoing reasons, the motion for additional argument time, and for leave to participate in oral argument, should be granted.

Respectfully submitted,

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(19)

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FILED
APR 8 1988
JOSEPH F. SPANIOL, JR.
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BRIEF FOR APPELLEES SCHMULTS AND DINKINS

STATEMENT

This case presents the question of the constitutionality of a significant alteration in the way our government operates. The issues to be resolved cut across party and political lines and will affect the shape of our government not just today, and with respect to this Administration, but well into the future. To reverse the court of appeals and approve the independent counsel provisions of the Ethics in Government Act would be to endorse Congress's constitutionally impermissible rationale that the Executive may not be trusted to faithfully execute the laws. The inevitable result would be an unwarranted imbalance of power among the branches.

* * * *

On April 23, 1986, a special three-judge "court" acting pursuant to the Ethics in Government Act, 28 U.S.C. §§ 591 *et seq.* ("the Act"), named an independent counsel to conduct a criminal investigation into the activities of former Assistant Attorney General Theodore B. Olson. On May 29, 1986, the first independent counsel resigned, and the special court appointed Alexia C. Morrison to succeed him. The special court thereby purported to vest in Ms. Morrison all the prosecutorial authority and discretion of the Attorney General with respect to a certain range of activities, and to divest the President and the Attorney General of any power to participate in, guide, or control any aspect of her investigation. Appellant Morrison is one of several independent counsels who, together with their large staffs, currently purport to exercise the investigative and prosecutorial authority of the United States with respect to a broad and diverse range of activities. This case presents a constitutional challenge to appellant's authority to exercise that power pursuant to the Act.

Congressional Inquiries Into Superfund. The independent counsel's investigation is part of an ongoing and acrimonious confrontation between the Executive and

Legislative Branches that began in 1982, when two congressional oversight committees began an inquiry into the administration by the Environmental Protection Agency of the Hazardous Substance Response Fund known as "Superfund". J.S. 4a. During those investigations, the two committees requested and subpoenaed numerous internal documents from EPA. On the advice of the Department of Justice (DoJ), the EPA made certain documents available but withheld others, asserting that the withheld documents were privileged. After court proceedings—including an unprecedented suit brought by the Executive Branch against the Legislative Branch, *United States* v. *House of Representatives of the United States*, 556 F. Supp. 150 (D.D.C. 1983)—and lengthy negotiations, the Executive and the Legislature reached agreement on document production. J.S. 4a.

In the next Congress, the majority members of a subcommittee of the House Committee on the Judiciary began an investigation—unknown to many Committee members—into the conduct of the DoJ during the Superfund document controversy. J.S. 5a.[1] The results of the investigation were compiled in a 3,000-page report issued by majority members of the Committee over the vehement dissent of minority members. The report complained of actions by DoJ officials during both the Superfund investigation and the subsequent Judiciary Committee inquiry. The Judiciary Committee letter transmitting the report to the Attorney General requested that he conduct an inquiry and that he apply for an independent counsel under the provisions of the Ethics Act.[2]

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[1] *See also* Report on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83, H.R. Rep. No. 435, 99th Cong., 1st Sess. 731 (1985) (dissenting views).

[2] *See* Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in the United States House Judiciary Committee Report at 2 (April 10, 1986) ("Attorney General Report"). Appellant has lodged with this Court a copy of this Report and the other documents discussed in this section.

Actions of the Attorney General. The Attorney General concluded that the congressional report contained sufficient information to warrant "preliminary investigations" under 28 U.S.C. § 592 with respect to the following issues:

> (A) Whether the conduct of former Assistant Attorney General Theodore Olson in giving testimony at a hearing of the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee on March 10, 1983, and later revising that testimony, regarding the completeness of the Office of Legal Counsel's response to the Judiciary Committee's request for OLC documents, and regarding his knowledge of EPA's willingness to turn over certain disputed documents to Congress, violated 18 U.S.C. § 1505, § 1001, or any other provision of federal criminal law;
>
> (B) Whether the conduct of former Deputy Attorney General Edward Schmults, resulting in the undisclosed withholding of documents from the House Judiciary Committee from March, 1983, through April, 1984, violated 18 U.S.C. § 1505, § 1001, § 1512 or any other provision of federal criminal law;
>
> (C) (1) Whether the conduct of former Assistant Attorney General Carol Dinkins, resulting in the undisclosed withholding of documents from the Judiciary Committee during its investigation, violated 18 U.S.C. § 1505, § 1001, § 1512, or any other provision of federal criminal law; and (2) whether the conduct of Mrs. Dinkins in preparing and submitting a declaration in the case captioned *United States* v. *United States House of Representatives*, Civil No. 82-3583 (D.D.C.), violated 18 U.S.C. § 1503, § 1621, § 1623, § 401, § 1001, § 1512, or any other provision of federal criminal law.

Attorney General Report at 2-5.

After an exhaustive inquiry and internal reviews, the Attorney General on April 10, 1986 requested the special

court to appoint an independent counsel to investigate the discrete allegation concerning Mr. Olson (set out in (A) above). *Id.* at 11. Consistent with the recommendation of senior DoJ official John C. Keeney, the Attorney General determined that there were no reasonable grounds to investigate Mr. Schmults and Ms. Dinkins further. *Id.* at 26, 47-48.

Initiation of the Olson Investigation. On April 23, 1986, the special court issued an Order appointing James C. McKay as independent counsel and defining his jurisdiction in broader terms than had been referred by the Attorney General. Order, Div. No. 86-1 (D.C. Cir., Div. for the Purpose of Appointing Independent Counsels, April 23, 1986). The court ordered Mr. McKay to investigate

> whether testimony of Mr. Theodore Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 or § 1001 or any other provision of federal law.

Id. On its own initiative, the court also ordered that Mr. McKay

> shall have jurisdiction to investigate any other allegation or evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation.

Id. The special court's order expressly granted the independent counsel "all the powers and authority" provided by the Act. The independent counsel's investigation has continued since that date two years ago.

Request for Expanded Jurisdiction. On November 14, 1986, the independent counsel requested, in a letter to the Attorney General, that he refer to her the allegations in the congressional report against Mr. Schmults and Ms. Dinkins, as well as an ongoing investigation by the Department of Justice of Robert M. Perry, former General Counsel to the EPA. She also stated that "standing in isolation, as framed by your report, Mr. Olson's testimony of March 10, 1983, probably does not constitute a prosecutable violation of any federal criminal law, based on my present understanding of the evidence."

In a letter dated December 17, 1986, Deputy Attorney General Burns responded that the Attorney General would refer the ongoing Perry investigation to appellant but would deny her request to investigate Mr. Schmults and Ms. Dinkins. The letter emphasized that the Attorney General had concluded once before that there were no reasonable grounds warranting further investigation or prosecution, and that any "new evidence" on which appellant purported to rely either had previously been considered or did not change his position.

Appellant then turned to the special court and, without notice to Mr. Schmults or Ms. Dinkins, requested that the court refer to her the allegations against Mr. Schmults and Ms. Dinkins. The Attorney General opposed her application.

On April 2, 1987, the special court denied Ms. Morrison's Application. *In re Olson*, 818 F.2d 34 (D.C. Cir., Div. for Purpose of Appointing Independent Counsels, 1987). The court first went out of its way to "uphold" the constitutionality of the Act. It then ruled that, as a matter of *statutory* construction, it did not have authority to refer allegations to an independent counsel for possible *prosecution* when the Attorney General twice had specifically determined that those allegations should not be pursued. *Id.* at 47. However, purporting to construe its original grant of jurisdiction, the court advised that "authority to investigate allegations and evidence that Theodore Olson was engaged in an unlawful conspiracy with others" was "implicit" in its initial grant of jurisdiction, and that appellant therefore had power to investigate whether appellee Olson's testimony "was part of a larger, concerted plan, including Mr. Schmults, Ms.

Dinkins or others, to obstruct or impede the Committee's investigation." *Id.* at 48.

Proceedings Below. In May and June 1987, the independent counsel caused the issuance of grand jury subpoenas upon the three appellees. J.A. 9-22. Appellees moved to quash the subpoenas on the ground that the independent counsel had no lawful authority to cause their issuance because the Ethics Act is unconstitutional. The district court rejected this argument. J.A. 19-26. In order to appeal that ruling, appellees refused to comply with the subpoenas and were held in contempt of court. J.S. 140a-148a. Appellees thereafter appealed the contempt orders. The court of appeals reversed, ruling, 2-1, that the Act is unconstitutional. J.S. 1a. This appeal followed.[3]

SUMMARY OF ARGUMENT

A. The independent counsel statute violates Article II of the Constitution. Although the independent counsel's responsibilities bear all the hallmarks of the prosecutorial authority entrusted by the Constitution to the Executive, appellant and her staff are not Executive Officers. Appellant was appointed by Judges and not by the President with the consent of the Senate, as required by the Appointments Clause, Article II, § 2, for a "superior" Executive Officer with her final authority. Even if appellant is an "inferior Officer", her appointment violates the Appointments Clause. Under the "excepting clause" of Article II, § 2, Congress may authorize the courts to appoint certain "inferior Officers," but appellant could not properly be appointed by a court because she exercises core Executive functions. The Act's removal provisions also violate Article II. Appellant is removable only for good cause, subject to review and reinstatement by the Judiciary, not by the President at will, as required for an Executive Officer exercising core Executive functions—particularly one who is subject to ongoing oversight by Congress and the Judges, not by the President and the Attorney General. In short, although the independent counsel and her staff are purporting to exercise Executive authority, they meet none of the constitutional criteria for the exercise of that authority.

[3] After appellees were held in contempt for failure to comply with the subpoenas, the Act was amended in several significant ways, only some of which were made applicable to ongoing investigations. This brief addresses, and the Court should consider, as did the court of appeals, the Act as it existed at the time of the contempt, in determining the validity of the contempt citations. *See* J.S. 53a n.41.

B. The method of appointing associate counsel under the Act also violates Article II, § 2 of the Constitution. Under the Appointments Clause, Officers of the United States who are not nominated by the President and confirmed by the Senate may be appointed *only* by the President, a Department Head, or a court of law. Associate counsel are Officers, whether inferior or superior, but they were appointed by the independent counsel, not in the manner prescribed by Article II. Under *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the appointment of associate counsel is invalid.

C. The Act also violates Article III. Appellant derives her authority and her mandate from a "court" exercising unreviewable, non-judicial power in violation of Article III of the Constitution. Under authority of the Act, the special court has selected appellant as independent counsel; defined her prosecutorial jurisdiction, and, as a consequence, determined what power was to be removed from the Attorney General; issued an advisory order classifying appellant and her staff as employees of a "special agency" outside the Department of Justice; and ordered the release of internal DoJ documents over the objection of the Department. Neither the definition of a criminal investigation into all aspects of a citizen's life, nor the issuance of advisory opinions, is the appropriate business of Article III courts. The Act unconstitutionally forces upon judges not their customary duty

to make judicial decisions based on established precedent and rules of law in adversarial proceedings but, instead, the obligation to make political choices in which the rule of decision is personal opinion and *ex parte* contacts are the norm.

D. In recent decisions this Court has reasserted the Constitution's fundamental separation-of-powers principles and has rejected congressional encroachment on the exclusive powers of the Executive Branch. *See Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986); *INS* v. *Chadha*, 462 U.S. 919 (1983); *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *See also United States* v. *Nixon*, 418 U.S. 683, 704 (1974). These cases reaffirm that a concentration of power in a single branch of government is unacceptable, and that an intrusion by one branch into the domain of another—including an effort by Congress, as here, to decrease Executive power and thereby aggrandize its own—must be avoided. Neither Congress nor the courts has the constitutional authority to prosecute criminal activity or to divest the Executive of its constitutional duty to prosecute. The independent counsel statute does just that, however, by removing from the Executive the exclusive authority to decide whom to prosecute and for what and by placing that authority instead in an Officer who is independent of the Executive with respect to selection, oversight, and removal. Even if not unlawful because of the appointment provisions, or removal provisions, or oversight provisions *on their own*, read as a whole the independent counsel statute is unconstitutional.

E. Lower courts uniformly have held that a motion to quash a subpoena is the proper vehicle for challenging the authority of a government attorney to appear before the grand jury and cause issuance of a subpoena. The motion presents a concrete case or controversy that is ripe for resolution. Appellant incorrectly argues that appellees' challenge is not ripe; in any event, she waived this claim by failing to raise it in the district court.

ARGUMENT

I. THE ACT VESTS IN THE INDEPENDENT COUNSEL POWER AND AUTHORITY BELONGING EXCLUSIVELY TO THE EXECUTIVE.

The independent counsel provisions of the Ethics Act vest in the independent counsel and her staff power and authority that are constitutionally entrusted to the Executive Branch alone. Her exercise of those powers cannot be sustained.

A. The Function of Prosecuting Offenses Against the United States Belongs Exclusively to the Executive.

Article II of the Constitution vests all Executive power in the President and commands him to "take Care that the Laws be faithfully executed." This clause confers on the Executive Branch the "exclusive authority and absolute discretion . . . to prosecute a case." *United States* v. *Nixon*, 418 U.S. at 693. In *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928), this Court observed, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them *or appoint the agents charged with the duty of such enforcement. The latter are executive functions.*" (Emphasis supplied). Fifty years later, in *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976), this Court repeated that theme, asserting that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *See also id.* at 285 (White, J., concurring and dissenting) ("I would be much more concerned if Congress purported to usurp the functions of law enforcement. . . ."); *INS* v. *Chadha*, 462 U.S. 919, 1002 (1983) (White, J., dissenting) ("A legislative check on an inherently executive function, for example, that of initiating prosecutions, poses an entirely different question."). As this Court noted recently,

> [A]n agency's refusal to institute proceedings shares to some extent the characteristics of the de-

> cision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Heckler v. *Chaney*, 470 U.S. 821, 832 (1985).

The decision whether and how to prosecute is necessarily affected by a variety of policy considerations, and the identification and weighing of competing policies and interests is committed to the exclusive discretion of the Executive.[4] Judgments as to the deterrence value of a prosecution, enforcement priorities, and the relationship of a given case to the government's overall enforcement plan, are entrusted by the Constitution to the Executive alone. So, too, are decisions on the legal position to take on issues that transcend a particular case; as the D.C. Circuit has noted, "a prosecutor may lawfully take account of many factors other than probable cause in making such decisions." *Nader* v. *Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974). "That the balancing of these permissible factors in individual cases is an executive, rather than a judicial, function follows from the need to keep the courts as neutral arbiters in the criminal law generally, . . . and from Art. II, § 3 of the Constitution, which charges the President to 'take care that the laws be faithfully executed.'" *Id.* (citing numerous cases). Not surprisingly, the decision not to prosecute, based as it necessarily must be on an amalgam of policy judgments entrusted to the Executive, is not subject to

[4] The Firth Circuit affirmed these principles in *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (*en banc*), *cert. denied*, 381 U.S. 935 (1965), holding that the judiciary could not constitutionally encroach on the Executive Branch's discretion by ordering a prosecutor to prosecute a case in which the grand jury had returned an indictment. "It follows," the court said, "as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." *Cox*, 342 F.2d at 171.

judicial review. *See Wayte* v. *United States*, 470 U.S. 598, 607-08 (1985). The "remedy for any dereliction of [a prosecutor's] duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people." *Pugach* v. *Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961).

The Executive's power to prosecute is complemented by its exclusive authority "to grant reprieves and pardons for offenses against the United States," Art. II, § 2, a power which "is not subject to legislative control." *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867). As Chief Justice Marshall explained, "A pardon is an act of grace, *proceeding from the power intrusted with the execution of the laws*, which exempts the individual . . . from the punishment the law inflicts for a crime he has committed." *United States* v. *Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (emphasis supplied). When they granted the President this broad power to pardon, the Framers of course recognized the potential for abuse through favoritism or otherwise. Thus, after the pardon power was proposed, "Mr. Randolph moved to 'except cases of treason'. The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments." 2 *The Records of the Federal Convention of 1787*, at 626 (Farrand rev. ed. 1937). To that, Mr. Wilson responded: "Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted." *Id.*[5] To respond to this possibility of abuse, the Framers provided Congress not only with numerous checks on the

[5] Similarly, in a document entitled "Objections to This Constitution of Government," written on the blank pages of a draft of the Constitution, George Mason observed: "The President of the United States has the unrestrained power of granting pardons for treason, which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt." 2 *The Records of the Federal Convention of 1787*, at 639 (Farrand rev. ed. 1937).

Executive but also with the ultimate weapon of impeachment to invoke in the event of abuse, and they expressly withheld the power to pardon in the event of impeachment. This Court subsequently reaffirmed that, when necessary, impeachment, and *not* a "narrow and strained construction of the general powers of the President," *Ex Parte Grossman*, 267 U.S. 87, 121 (1925), is the proper recourse for a perceived abuse of the pardon power.

The same is true with respect to the power to execute the laws. The Constitution provides Congress with the impeachment power in the event the Executive abuses its power—as by giving favored treatment to targets of a criminal investigation in the face of conflicts of interest. Congress has no more authority to choose an alternate course, and to remove from the Executive the power to prosecute, in mere *anticipation* of abuses of that power, than it would to bar presidential exercise of the pardon power in the event of a perceived conflict of interest.

The Constitution squarely places in the Executive Branch alone the authority to prosecute offenses against the United States.[6] The power to make investigative

[6] This Court's recent decision in *Young* v. *United States ex rel. Vuitton et Fils*, 107 S. Ct. 2124 (1987), makes clear that the Executive alone has the constitutional authority to prosecute and punish conduct proscribed as harmful by the general criminal laws. That case approved the practice of appointing private attorneys to prosecute criminal contempt cases because of the special nature of contempt, which is "designed to serve the limited purpose of vindicating the authority of the court." *Id.* at 2133. Far from endorsing non-Executive Branch prosecution of conduct proscribed "by the general criminal laws," *id.*, the Court explicitly distinguished such cases—involving "execution of the criminal law in which only the executive branch may engage," *id.*—from contempt cases in which such prosecution would be permitted. This Court expressly limited its holding: "Acknowledging the limited authority of courts to appoint contempt prosecutors thus provides no principle that can be wielded to eradicate fundamental separation-of-powers boundaries." *Id.* at 2134 n.10.

and prosecutorial decisions is a crucial component of the Executive's constitutional duty to take care that the laws are faithfully executed. Any congressional action that vests this power outside the Executive Branch violates the separation of powers.

B. The Act Vests in the Independent Counsel the Full Authority to Prosecute Offenses Against the United States.

The independent counsel provisions of the Ethics Act vest in the Court's appointee the full investigative and prosecutorial power of the Attorney General and the Department of Justice. In her capacity as independent counsel, appellant is effectively immune from Executive Branch scrutiny and control in her exercise of those powers. On all matters within the jurisdiction defined by the court, appellant may execute the laws in the name of the United States without any regard whatsoever for the policies or views of the Executive Branch.

While a single investigation might appear to divest the Executive of its authority only in a narrow area, the Ethics Act on its face authorizes a broad and unlimited incursion into—and consequent diminution of—Executive authority. The Act places no limit on the number of independent counsels who may be appointed at one time, on the duration of their tenure, or on the scope of their permissible jurisdiction—and it consequently places no limit on the extent to which the Executive may be divested of its authority. At this time, there are ongoing at least four public and some private investigations, in at least two of which the independent counsels have divested the Executive of ultimate authority over *both* prosecutorial decisionmaking and a slice of foreign affairs and national security decisionmaking.[7]

[7] As the court of appeals noted, the investigation of Independent Counsel Whitney North Seymour has placed him at odds with the Department of State and a foreign government whose representatives Mr. Seymour sought to subpoena. *See* J.S. 57a-58a.

[Continued]

A review of the statutory scheme highlights the breadth of these independent counsels' powers. By statute, Ms. Morrison has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General," 28 U.S.C. § 594(a). She is specifically empowered to conduct grand juries, engage in any necessary civil or criminal litigation, appeal any court decision, make determinations whether to contest any testimonial privilege, challenge any attempted withholding of evidence based on assertions of national security, apply to a court for immunity for witnesses, for subpoenas or for warrants, inspect tax returns, initiate prosecutions and sign indictments—in short, to handle all aspects of any case within her jurisdiction in the name of the United States. *Id.* Appellant may additionally have access to records and files of DoJ, and she has the entire staff of that Department at her beck and call. *Id.* § 594(d). She also has an unlimited budget and the discretion to appoint a staff of any size and composition to her liking. *Id.* § 594(c).

An independent counsel's most significant power is perhaps the decision whether to prosecute and, if so, for what. The assertion of *Amicus Curiae* (and Independent Counsel) Whitney North Seymour that this step is "ministerial," and that a referral by the Attorney General to the special court constitutes a "*policy* decision" by the Attorney General that "a prosecution should take place (if supported by the facts)," [8] is astonishing. Brief for

[7][Continued]

Other ongoing investigations or prosecutions involving alleged misconduct by officials covered by the Act necessarily involve classified information and require independent counsels to make critical decisions about disclosures of national security and classified information in the course of their prosecutions. The authority to weigh national security concerns against the value of a prosecution would otherwise be within the exclusive province of the President.

[8] Mr. Seymour ignores the many decisions he made, such as the number of counts to include in the indictment. He surely cannot

Whitney North Seymour at 14-15. The policy decision on *whether to prosecute* certainly is not made "when the Attorney General decides to file the application for appointment of Independent Counsel, . . ." *Id.* at 16. Under the Ethics Act, the Attorney General "shall apply" for the appointment of an independent counsel if, "upon completion of the preliminary investigation," he "finds reasonable grounds to believe that further investigation or prosecution is warranted." 28 U.S.C. § 592(c)(1). There is no room to consider the factors that normally go into the decision whether to prosecute, and no authority to employ the normal tools of investigation. *See* § 592(a)(2). Far from it, referral is mandatory,[9] and discretion whether to prosecute lies with the independent counsel, not the Attorney General.

Ostensible limits on the independent counsel are inconsequential. The Act states that the independent counsel "shall, *except where not possible*, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f) (emphasis supplied). Even if "written or other established policies" existed in any meaningful way, the provision has no teeth to it. By its terms it permits an independent counsel to ignore DoJ policies,[10] and it purports to provide no remedy for any

mean to suggest that the Attorney General, and not he, made the decision to include five counts in the indictment of Michael Deaver, thereby requiring that subpoenas be served on the Canadian Ambassador, or that such a decision, with significant diplomatic ramifications, is merely "ministerial."

[9] In contrast, *Amicus Curiae* Common Cause (at page 7) recognizes the mandatory character of the referral provision.

[10] As the court of appeals recounted, another independent counsel already has shown that he will freely ignore DoJ policies and guidelines, *see* J.S. 72a-73a. This is particularly troublesome in a case involving national security and classified information. Guidelines promulgated by the Attorney General pursuant to statute *require* a decision whether the potential damage to the national security that might result from the disclosure of classified in-

failure to adhere to them.[11] In any event, the "written or other established policies" of the Department cannot conceivably cover the numerous policy decisions that might affect the determination of whether or how to bring a particular prosecution. Finally, the written guidelines that exist "are replete with qualifiers, modifiers, provisos, exceptions and limitations, intermixed with buzzwords" amounting to a "mere precatory exhortation to be good and to be fair . . . ." *United States* v. *Shulman*, 466 F. Supp. 293, 299 (S.D.N.Y. 1979). They are cast in discretionary terms and give tremendous leeway to any person attempting to adhere to them.

In short, the Act lodges the full investigative and prosecutorial power of the Executive in the private individual appointed to serve as independent counsel. The result is an independent counsel who wields the "full machinery of the state," *Young* v. *Vuitton*, *supra*, 107 S. Ct. at 2141, and yet is uniquely unaccountable.

II. VESTING ULTIMATE RESPONSIBILITY FOR EXECUTIVE DECISIONS IN AN OFFICER APPOINTED BY A COURT VIOLATES ARTICLE II.

The President's power and duty to execute the laws must carry with it the right to choose the Officers who assist him. As this Court has held:

> "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided

formation outweighs other federal interests that would allegedly be furthered were the prosecution to proceed. *See Attorney General's Guidelines for Prosecutions Involving Classified Information*, promulgated pursuant to 18 U.S.C. App. IV § 12. Failure to adhere to such a policy obviously could have critical consequences.

[11] The U.S. Attorneys' Manual explicitly states that its guidelines are precatory only and confer no rights on individuals. *See* USAM § 1-1.100. Moreover, even the guidelines observe that the standards set forth therein are filled with discretion: "Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law." USAM § 9-27.110 (comment).

> could not execute the laws. He must execute them by the assistance of subordinates . . . As he is charged specifically to take care that they be faithfully executed, *the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him* under his direction in the execution of the laws."

Buckley v. *Valeo*, 424 U.S. at 135-36 (emphasis supplied) (quoting *Myers* v. *United States*, 272 U.S. 52, 117 (1926) (citations omitted)). Article II, § 2 of the Constitution expressly gives the appointment power to the President. It provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President's authority to select the Officers of the United States who will execute the laws is at the heart of the power constitutionally entrusted to him. Whatever control over those Officers might be removed from the Executive, in a quest for independence, this Court has repeatedly stressed that Officers executing the laws shall "not [be] independent of the Executive with respect to their appointments." *Buckley* v. *Valeo*, 424 U.S. at 136 (noting also that even with respect to the removal of heads of independent regulatory agencies, Court was dealing with an agency intended to be independent "*except in its selection.*") (emphasis in original). *See also Humphrey's Executor* v. *United States*, 295 U.S. 602, 625 (1935) (same). The appointment provision of the Act conflicts directly with this basic principle and is therefore unconstitutional.

A. Ultimate Responsibility for the Execution of the Laws Cannot Be Assigned to an Officer Appointed Other Than by the President With the Advice and Consent of the Senate.

An Officer who has ultimate responsibility for the execution of the laws is a "superior" Officer who must be appointed by the President with the advice and consent of the Senate and cannot constitutionally be appointed by a division of a court. *Buckley* v. *Valeo*, *supra*, establishes that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of [Article II]." In *Buckley*, this Court held that Federal Election Commissioners exercise "significant authority," that they are therefore Officers of the United States, and that Congress may not, consistently with the Constitution, appoint those Officers itself. As the independent counsel clearly exercises "significant authority," [12] Article II, § 2, cl. 2, controls her appointment.

Article II, § 2 establishes two classes of Officers of the United States. Certain Officers in the Executive Branch exercise sufficiently "significant authority" as to be "superior" or "principal" Officers whom the President constitutionally is required to appoint with the consent of the Senate.[13] Other "inferior Officers" operate in sub-

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[12] If there could be doubt on this issue, this Court's decision in *Buckley* v. *Valeo* would remove it. In that case, the Court held that statutory provisions vesting in Federal Election Commissioners the authority to conduct civil litigation to vindicate public rights rendered the commissioners "officers": "Such functions may be discharged only by persons who are 'Officers of the United States' within the language of [Article II, § 2]." 424 U.S. at 140.

[13] The term "superior" is used to distinguish Officers who must be appointed by the President with the advice and consent of the Senate from those "inferior Officers" who need not be so appointed. Although the term "superior" Officer does not appear in the Constitution, it is the term used by James Madison at the Constitutional Convention, *see infra* at 20-21, and by this Court in *United States* v. *Eaton*, 169 U.S. 331, 343 (1898), to describe such Officers.

ordinate positions and fall within the province of Article II's "excepting clause." [14] Congress may constitutionally delegate to the President, department heads, and courts of law the appointment of "inferior Officers," but it may not alter the method of appointing "superior" Officers. A threshold inquiry therefore is whether the independent counsel is a "superior" Officer who must be appointed by the President with the consent of the Senate, or whether she is an "inferior Officer" who may be otherwise appointed as provided in Article II's "excepting clause." [15] If she is a superior Officer under the Act, her appointment by a court is unconstitutional.

History and case law support the holding below that the independent counsel is a "superior" Officer who must be appointed by the President with the advice and consent of the Senate, and that the class of "superior" Officers is not limited to the Ambassadors, Consuls, Public Ministers, and Supreme Court Judges specifically mentioned in Article II, § 2, as appellant maintains (at pages 30-31).[16] The label "superior" Officer applies to a group

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[14] The "excepting clause" provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2.

[15] Employees, who are "lesser functionaries subordinate to officers of the United States," are outside the scope of Article II. *Buckley*, 424 U.S. at 126 n.162.

[16] After unsuccessfully arguing in the court of appeals that "superior" Officers are *solely* the Ambassadors, Public Ministers, Consuls and Supreme Court Judges named at the start of Article II, § 2, various *amici* have now altered their construction to include also those Officers in whom the power of appointment may be vested: the President, department heads, and courts of law. *See, e.g.*, Brief *Amicus Curiae* of Lawrence E. Walsh, Independent Counsel ("Walsh Brief") at 10; Brief for *Amicus Curiae* Public Citizen at 7. Even putting aside the curious suggestion that a "court of law" is an Officer, the contemporaneous debates demonstrate that the class of superior Officers is not so rigidly defined by reference to the

of Officers who exercise sufficient authority and discretion as to require the acquiescence of two branches of government in their selection. Indeed, the right of the Senate to withhold consent for any reason or no reason is one of the Constitution's several checks on Executive power, because it enables the Senate to "deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed." *Ex Parte Grossman*, 267 U.S. at 120. Like the distinction between Officers and employees at issue in *Buckley* v. *Valeo*, *supra*, the distinction between "superior" and "inferior Officers" is not defined by title or other formalistic rule. Instead, a substantive assessment of the authority and independence enjoyed by the Officer in question determines whether he is a "superior" Officer whose appointment is governed by Article II.

The "excepting clause"—providing for "inferior" Officers an exception to the prescribed method of appointing Officers—was added to Article II two days before adjournment of the Constitutional Convention. After the

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text as these briefs suggest. For example, in his Commentaries Joseph Story noted, "Whether the heads of departments are inferior officers, in the sense of the constitution, was much discussed in the debate on the organization of the department of foreign affairs, in 1789. *The result of the debate seems to have been that they were not.*" 2 J. Story, *Commentaries on the Constitution of the United States* § 1536, at 398 n.1 (3d ed. 1858) (emphasis supplied). *See also infra* at 20-24.

In any event, there is no reason to adopt the interpretation posited by these *amici*. The text certainly offers no reason to define superior Officers by reference solely to those named somewhere in the clause. In fact, the *sole* support for the textual argument is *dictum* in *United States* v. *Germaine*, 99 U.S. 508, 510 (1879). The issues in *Germaine* required no consideration of the distinction between superior and inferior Officers, and the Court would have had no occasion to consider the early commentaries (discussed in text) with which its passing remark, as construed by various *amici*, is so completely at odds. In fact, it is likely that the Court used the term "specially mentioned" to refer to what it had just called "the primary class"—those Officers who must be nominated by the President and confirmed by the Senate. *See* 99 U.S. at 509-10.

clause was proposed and seconded, James Madison observed:

> It does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.

2 *The Records of the Federal Convention of 1787*, at 627 (Farrand rev. ed. 1937).[17] This statement indicates that, within the broad category of Officers, the Framers envisioned a sub-category of superior Officers that included department heads as well as certain persons below them. As "superior" (as opposed to "inferior") Officers, those persons would not fall within the ambit of the excepting clause, but instead were to be appointed by the President with the consent of the Senate, as prescribed by the remainder of the section. Not surprisingly, the First Judiciary Act provided for presidential appointment *with the advice and consent of the Senate* not just of the Attorney General, but also of United States Attorneys—who are not specifically mentioned in Article II.[18] *See also United States* v. *Eaton*, 169 U.S. 331, 343-44 (1898) (in early periods of government, Officers "known as vice-consuls were appointed by the President and confirmed by the Senate, [and] the officials thus designated were . . . in reality principal officials.") (citations omitted); 2 J. Story, *Commentaries on the Constitution of the United States* § 1579, at 436 n.2 (1858) (quoting letter from Chief Justice Jay to George Washington).[19]

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[17] Governor Morris responded that "[t]here is no necessity. Blank Commissions can be sent—." 2 *The Records of the Federal Convention of 1787*, at 627 (Farrand rev. ed. 1937). Thereafter, on an equal vote, the motion to add the clause was lost. It then apparently was urged that the clause was too important to be omitted and, on a second vote, it was passed. *Id.*

[18] *See Parsons* v. *United States*, 167 U.S. 324, 337-44 (1897) (detailing history of appointment provisions regarding District Attorneys).

[19] Article II provides for presidential appointment (with the advice and consent of the Senate) of all Officers of the United States

Joseph Story similarly indicated that the answer whether Judges other than those of the Supreme Court are "inferior Officers" is not determined by the specific enumeration in the text of Article II but by a more substantive inquiry:

> Whether the judges of the inferior courts of the United States are such inferior officers as the Constitution contemplates to be within the power of Congress to prescribe the mode of appointment of, so as to vest in the President alone, or in the courts of law, or in the heads of departments, is a point upon which no solemn judgment has ever been had. The practical construction has uniformly been, that they are not such inferior officers.

2 J. Story, *Commentaries on the Constitution of the United States* § 1599, at 445 n.2 (1858). Most critically, Story noted that there is no clear line delineating inferior and superior Officers: "In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the Senate." *Id.* § 1536, at 397-98. There could scarcely be a more direct statement that the line between these classes may not be determined solely by reference to their enumeration in the text.

The determination as to whether an Officer is "superior" or "inferior" appropriately turns on a substantive evaluation of the appointee's duties, his powers, and the extent of his independence from control by superiors—the same factors that distinguish Officers from

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except as "herein otherwise provided"—that is, except as provided for elsewhere in the Constitution. The argument that the "herein" wording in Article II, § 2, refers to the Appointments Clause of Article II and not to the Constitution is belied both by the analysis of Justice Jay and by logic. It also is contrary to the history of the clause; since the excepting clause was added long after the rest of Article II, § 2 and the "herein" language, that language cannot possibly refer to the excepting clause.

employees. *See Buckley*, 424 U.S. at 126 and n.162; *see also id.* at 269-70 (White, J., concurring and dissenting). The appointee's title, of course, cannot be dispositive; nor is the determination of Congress as to the method of appointment, as *Buckley* makes clear. Appellant and various *amici* take issue with the court of appeals' ruling that, at a minimum, an Officer who has no superior is a principal Officer. Citations to dictionary definitions of the word "inferior" cannot mask the fact that independent counsels exercise *final* authority in the execution of the criminal laws, with a direct and often traumatic impact on the targets of that exercise of power. By any definition, such an Officer must be "principal," unless the sole criterion is title (*i.e.*, is the title in Article II?) or unless the decision whether an Officer is "inferior" is committed entirely to Congress. The former is implausible, since Congress then could create (as it has here) a new office to exercise powers of an existing principal Officer and thereby remove all Executive control. The latter, too, is implausible. To defer completely to Congress [20] would be to authorize Congress to remove from the Executive all authority to participate in the appointment of his "necessary agents." *Ex Parte Grossman, supra*, 267 U.S. at 120.[21]

At the same time, appellees Schmults and Dinkins submit that the dividing line between "superior" and "in-

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[20] *Amicus Curiae* American Bar Association relies (at pages 10-11) on the "as they think proper" language in the excepting clause for its textual argument that Congress has complete discretion to decide who is an "inferior Officer." A much more natural interpretation of that language is that Congress may alter the mode of appointment of "inferior Officers" to the extent "they think proper," not that Congress may define who is an "inferior Officer."

[21] If the Court agrees with the court of appeals that inter-branch appointments of "inferior Officers" are unconstitutional, the significance of the superior/inferior Officer distinction diminishes. If, however, this Court disagrees with that ruling, the need to maintain Executive appointment power over a class of key Officers becomes critical.

ferior" Officers is not simply whether the Officer has a superior, as the court of appeals might have suggested. It is clear that department heads are "superior" even though they have a "superior"—the President. Similarly, Ambassadors and consuls are unquestionably "superior" even though they are subordinate to the Secretary of State, and "inferior court" Judges also have been treated as "superior" Officers. The determination whether a particular Officer is a "superior" Officer will require in some cases a detailed analysis of the appointee's duties and powers, as well as the extent of his independence from control by superiors.[22] The categorization of the independent counsel is easy because of that Officer's unparalleled independence in wielding law enforcement power with respect to individual citizens.

The independent counsel created by the Ethics Act is a "superior" Officer. Within her jurisdiction she exercises the same power to hire and remove Officers and establish and implement Executive policy as is exercised in combination by the Attorney General and the more than two hundred Department of Justice officials who are appointed by the President with the advice and consent of the Senate. Indeed, since she is delegated the authority to make decisions *without any duty* to confer with Executive Branch Officers[23] or to abide by Executive Branch wishes, her power is perhaps more properly

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[22] This Court in *Buckley* v. *Valeo* implicitly rejected the textual analyses proposed by appellant when it held that, because of the significant authority the Federal Election Commissioners exercise, they are "at the very least" inferior Officers, 424 U.S. at 126, thereby leaving open the possibility that Commissioners are "superior" Officers. When the method of appointment was amended after *Buckley*, Congress provided that the Commissioners be appointed by the President *with the advice and consent of the Senate*.

[23] The Act expressly grants the independent counsels the power to decide on their own to what extent, if any, they will consult with DoJ on any matter. 28 U.S.C. §§ 594(a)(10); 594(d).

analogized to that of the President in this area than the Attorney General.[24] She must, therefore, be appointed as

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[24] Given the independent counsel's unlimited budget, her freedom from routine competition for limited resources, and the absence of any restraint on the length of her probe, any supposed temporal and jurisdictional limits are dubious at best. The fact that she may exercise her ultimate powers for a limited time cannot be determinative. Indeed, she already has served longer than senior DoJ officials: "Statistics show that since 1969, Attorneys General have averaged 23.3 months in office, Deputies 13.5 months, and Associates 18.6 months." GAO, *Justice Department: Improved Management Processes Would Enhance Justice's Operations* 20-21 (March 1986). In cases such as *United States v. Eaton*, 169 U.S. 331, 343 (1898), that address the short period during which an "inferior Officer" may exercise the power of a superior, the President at all times retains the power to remove that Officer and appoint a replacement. Here, the independent counsel completely displaces Executive authority.

The suggestion of *Amicus Curiae* Walsh (at page 13)—that the independent counsel's jurisdiction is "restricted" because it is defined "in reliance on the Attorney General's own application" and cannot be expanded "to include matters which the Attorney General has previously determined should not be pursued"—is entirely misleading. In Mr. Walsh's own investigation, the special court appointed the independent counsel and then defined his jurisdiction vastly beyond that sought by the Attorney General in his application. Whereas the Attorney General's application had focused only on alleged arms sales to Iran and an alleged diversion of profits therefrom, and had not even mentioned Nicaragua, the special court authorized a sweeping investigation into the "provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984." Order, *In re North et al.*, Div. No. 86-6 (D.C. Cir., Div. for the Purpose of Appointing Indep. Counsels, 1986). The court derived this jurisdictional grant verbatim from a letter sent by Democratic Congressmen directly to the court after the Attorney General *refused* to include their proposed jurisdiction in his Application. Copies of the Attorney General's request, the congressional request, and the court's order establishing jurisdiction, all of which appellant in this case filed with the special court in aid of her effort to expand her jurisdiction, are being lodged with the Court for its convenience.

Nothing appears to preclude further expansion of the scope of the investigation by the court, unless the Attorney General is asked and explicitly refuses to authorize the addition of new targets of

are these Officers. To hold otherwise would be to authorize Congress to divest the Attorney General, or indeed the Secretary of State, of all authority in a given area and, citing a perceived exigency, to vest in a court the power to appoint a parallel Attorney General, or Secretary of State, with those same powers. Such a result would "be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *Nixon*, 418 U.S. at 704.

The vast discretion entrusted under the Act to the independent counsel is wholly different from that vested in officers previously held to be "inferior Officers." Unlike a postmaster first class, *see Myers*, *supra*, or a clerk of the district court, *see Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), both of whom are "inferior Officers," *see Buckley*, 424 U.S. at 126, *see also United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868) (clerk in office of Assistant Treasurer of the United States), who exercise no ultimate authority, the independent counsels wield the most powerful weapon of the state—the power to investigate, indict, prosecute, and seek punishment of an individual. The effort of appellant and the several independent counsel *amici* to characterize themselves as "inferior" Officers is astonishing and deeply troubling. They make unreviewable judgments on a daily basis that strike at the core of the Executive function, and they exercise this great, unaccountable power over individual citizens free from all guidance and control by the Executive. At the same time, they are not removable at will by the Executive. No other Officer exercises core Executive powers but is not appointed by, answerable or accountable to, subject to review by, or removable by a more senior Executive Officer. Even with respect to regulatory agencies, whose Officers have been held not to

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the investigation. In this case, for example, while purporting to decline to permit an expansion, the special court advised the independent counsel to investigate a conspiracy that the Attorney General had said there was no basis for investigating.

exercise core Executive functions, the Officers are independent of the Executive "*except in* [*their*] *selection.*" *Buckley* v. *Valeo*, 424 U.S. at 136 (emphasis in original).

In sum, if there are any "superior" Officers whose appointment Congress cannot remove from the President, appellant must be in that category. The President is constitutionally entitled to appoint, with the consent of the Senate, department heads and "superior" Officers beneath them. In discrete areas, the independent counsels enjoy the full range of Executive responsibility entrusted to the Attorney General by the President, and their independence from the President, in fact, exceeds that of the Attorney General. To hold that these duties and responsibilities are those of mere "inferior Officers" would be to vest in Congress and the courts the means to usurp Executive control simply by creating a new office and transferring to it ultimate responsibility to exercise Executive power. The Constitution clearly forbids this.

B. An Inferior Officer with the Executive Power of the Independent Counsel May Not Be Appointed by a "Court of Law."

The court of appeals properly held that, even if the independent counsel were considered an "inferior Officer," Article II, § 2 does not authorize Congress to provide for her appointment and supervision by a court. This clause gives Congress authority to vest the appointment power over "inferior Officers" in the branch or department to which the Officer most appropriately belongs.[25] It cannot and does not authorize Congress to disregard basic separation of powers principles and instead vest the appointment power over core Executive Branch Officers in the Judicial Branch. Nor does it authorize any non-judicial activity by a court other than the proper exercise of any appointment power.

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[25] If the Officer does not most appropriately belong to one Branch, Congress may freely provide for his appointment from among those listed in the excepting clause of Art. 2, § 2, unless the result would be incongruous. *See* J.S. 37a-38a.

The basic purpose of the "excepting clause" is to allow the branches of government to appoint their own subordinate officials, to assure the compatibility of appointee, task and supervisor necessary to a functioning bureaucracy. For this reason, Congress may legitimately authorize the President to appoint any and all subordinate Executive Branch Officers, may vest in department heads the authority to appoint that department's subordinate Officers, and may grant federal judges the power to appoint Judicial Branch employees.[26]

It defies logic to read the provision more broadly, as suggested by appellant and *amici*, as allowing Congress to give the courts sole authority to appoint important, albeit "inferior," Officers of the Executive Branch.[27] To do so would give Congress the power to entangle the branches of government in stark violation of the carefully crafted separation of powers. It would, as the court of appeals observed, permit Congress to place in a court of its choice the power to appoint virtually all Officers of the Departments of Agriculture, State, or Defense, and thereby "prevent the President from exercising effective control over either the [Agriculture], State or Defense Department." J.S. 39a.

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[26] *See Rice* v. *Ames*, 180 U.S. 371, 378 (1901) (judicial appointment of court commissioner); *United States* v. *Eaton*, 169 U.S. 331 (1898) (presidential appointment of vice-consuls); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868) (Secretary of Treasury's appointment of clerks within his department); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839) (judicial appointment of court clerks); *Borak* v. *United States*, 78 F. Supp. 123 (Ct. Cl.), *cert. denied*, 335 U.S. 821 (1948) (Attorney General appointment of Immigration and Naturalization Service examiners).

[27] *See* Hearings on the Special Prosecutor Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 449, 452 (pt. 1) (1973) ("1973 Hearings") (statement of then-Acting Attorney General Bork) (power is one to "enhance convenience of administration, not to enable Congress to destroy the separation of powers by transferring the powers of the Executive to the Judiciary or, for the matter of that, transferring the powers of the Judiciary to the Executive").

The terrific chaos that would result from interbranch appointments led Judge J. Skelly Wright, dissenting in *Hobson* v. *Hansen*, 265 F. Supp. 902 (D.D.C. 1967) to reject, in the most persuasive and vigorous terms, the "plain meaning" construction of this clause offered by appellant and *amici*:

> [I]t is simply not true that Article II expresses any meaning quite so clear. Its language very naturally admits the common sense reading that courts of law and the other listed offices were meant to appoint only those officers "inferior" to them. . . . No one would dispute, for example, that Article II contemplates that Congress may permit a secretary to appoint only his own assistants, not the personnel of any of the other executive departments. And the narrower reading harmonizes with the most apparent purpose of Article II: to let Congress clothe secretaries and courts with the necessary authority for filling vacancies in their own staffs.

Id. at 921 (Wright, J., dissenting). *See also id.* at 920 (describing appellant's interpretation as "instinctively hostile to American constitutional tradition").

In its first look at the clause, this Court agreed that "the Constitution envisions rational and close relationships between the appointing branch and the nature of the function which the 'inferior officer' is to perform." Testimony of Roger Cramton, 1973 Hearings, at 350. In *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 257-58 (1839) (emphasis added), the Court upheld the authority of a federal judge to appoint and remove court clerks, observing that "[t]he appointing power . . . was no doubt intended to be exercised *by the department of the government to which the officer to be appointed most appropriately belonged.* The appointment of clerks of courts properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned."

Subsequently, in *Ex Parte Siebold*, 100 U.S. 371 (1880)—the case on which appellant and *amici* chiefly

rely to challenge the ruling below on this issue—this Court upheld a statute vesting in circuit courts the authority to appoint federal election supervisors. In the course of a lengthy opinion, involving a major confrontation between federal and state governments over control of congressional elections, this Court devoted just two pages to the argument that "no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government." *Id.* at 397. The Court rejected this reading of Article II:

> [T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and *in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void.* It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depository of official power capable of exercising it. *Neither the President, nor any head of department, could have been equally competent to the task.*

Id. at 398 (emphasis supplied). The Court acknowledged, however, that the assignment to a court of adjudicatory or decisional responsibilities *other than mere appointment* would render judicial participation "incongruous."

Appellant's reliance on *Siebold* is unavailing. First, election supervisors are not the same as independent counsels; the latter exercise final and unreviewable law enforcement authority at the heart of the Executive function, while the election supervisors exercised a limited, essentially non-Executive function. The duty of the election supervisors was to inspect and scrutinize the registration and voting process in congressional elections. Voting Rights Act of 1870, as amended, 16 Stat. 433, 434-35 (1871). *See also* J.S. 36a-37a (discussing role of election supervisors). If they could not exercise their

duties, they were to report to the chief supervisor of the district, who was also a commissioner of the circuit court. 16 Stat. 435-37. The commissioner was directed to hold a hearing concerning the allegations and to make a report to Congress. *Id.* at 436. In effect, the election supervisors were agents of Congress for the purpose of determining whether to seat members. *See Siebold*, 100 U.S. at 382, 386, 389. To the extent election supervisors were to assist the marshals in preserving the peace or making arrests for offenses committed in their presence, 16 Stat. 436, they were no different than any other "bystanders or posse comitatus" who, by statute, could be summoned to aid the marshal in performance of his duties. *Id.* at 437.

Second, as the court of appeals observed, *Siebold* did not present, and this Court did not address, a "question of congressional encroachment on the President's power to execute the laws." J.A. 36a. Rather, "according to the Court, the issue was whether 'the Act of Congress imposes upon the Circuit Court duties not judicial, in requiring them to appoint the supervisors of elections.'" *Id.*

Siebold stands generally for the proposition that Congress may authorize the *appointment* of inferior Officers by a court only when (1) the appointment power could not have been assigned to either the President or a department head with "greater propriety," "convenience," or "competence" and (2) there is no "incongruity" in the court's role as both appointing power and judicial Officer. 100 U.S. at 398.[28] It provides no authority for judicial appointment of an Officer exercising purely Executive authority. And it provides no authority for judicial participation in anything other than the appointment process.

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[28] As the court of appeals ruled, at a minimum "it must be incongruous if an officer of one branch is authorized to appoint an officer of another branch who is assigned a duty central to the constitutional role of that other branch." J.S. 38a.

The Ethics Act fails the test of *Siebold* first, by authorizing a court to appoint an Officer such as appellant with final responsibility for certain core Executive decisions, and second, by failing even to limit the duties of the court under the Act to that one function. Instead, the court also defines her jurisdiction, retains supervisory power over her, and, despite its conflict of interest, the court may review and overrule any Executive effort to remove her from office. In selecting the person who is to serve as independent counsel, and in defining her jurisdiction, the court is forced into the midst of political battles, when it plays a decisive role in the exercise of the Executive powers of investigation and prosecution without the benefit of judicial precedent or other decisionmaking criteria. This assignment places federal judges in a decidedly awkward and incongruous position. The perception of judicial fairness and neutrality that renders judges an acceptable choice for this role is itself threatened by a court's assumption of such a politically charged, non-judicial duty. As Judge Wisdom said in *United States* v. *Cox*, 342 F.2d at 192 (concurring opinion), "[t]he functions of prosecutor and judge are incompatible." Whatever the outer limits of the term "incongruous," this role falls squarely within it.[29] *See also Hobson* v. *Hansen*, *supra*, 265 F. Supp. at 922-24 (Wright, J., dissenting) (describing problems that arise from judicial involvement in highly-charged non-judicial activity).

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[29] *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931) does not hold that Congress may vest in courts the power to appoint inferior Officers (in that case, Commissioners) who exercise prosecutorial powers, as *Amicus Curiae* Walsh repeatedly asserts (at pages 16, 17 and 25). The Commissioners' exercise of prosecutorial power was not before the Court in *Go-Bart*. To the contrary, the Court expressly considered an exercise of power where the Commissioner "acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which that court had authority to take control at any time." 282 U.S. at 354. The passage quoted by Mr. Walsh enumerates the powers of the Commissioners generally, not the power presented to, and sustained by, this Court in that case.

Read together, this Court's decisions in *Siebold* and *Hennen* preclude reliance on Article II to approve judicial appointment of an Officer exercising duties that lie at the heart of the Executive's power to enforce the law. They further preclude reliance on Article II to approve non-judicial conduct undertaken by courts in connection with their appointment function. *See* Part V, *infra*. The special court's appointment, supervision, and removal authority under the Act fails on both counts and is therefore unconstitutional.

The appointment of appellant by the special "court" is unconstitutional for an additional reason. Although the appointment was made by a purported "division" of the court of appeals, that "division" has no operational or functional relationship to the court of appeals.[30] The division is in reality a collection of three judges whose sole function is to appoint and supervise independent counsel. Because that function is an Executive rather than a Judicial function, and because the Judges perform none of the functions characteristic of a court of law, the division does not constitute a "court of law" within the meaning of the "excepting clause." Congress has not entrusted the power to appoint independent counsel to a properly constituted court that ordinarily decides cases and controversies, as the "excepting clause" permits in certain circumstances. Simply denominating the panel of three judges as a division of a functioning

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[30] Other than appoint, define the jurisdiction of, and supervise independent counsels, the "court" performs only two functions: it has discretion to review applications for, and to award, attorneys' fees only where no case or controversy has arisen (that is, where no indictment is brought), and it has had jurisdiction over a civil action brought by an independent counsel whom the Attorney General has sought to remove. As noted *infra* in text, this latter role now has been removed from the special court, in part because of the inherent conflict in its reviewing the removal of an independent counsel it has appointed. *See* Brief of United States Senate as *Amicus Curiae* at 12 (quoting H.R. Rep. No. 316, 100th Cong., 1st Sess. 34 (1987)); J.S. 54a.

court should not render it a "court of law" when it otherwise does not act as one.

The recent amendments to the independent counsel provisions remove any argument that the special court is a "court of law" within the meaning of Article II. Under the pre-amendment act, the division *at least* adjudicated disputes about the removal of an independent counsel. *See* 28 U.S.C. § 596(a)(3). The amendments have removed that function from the division.[31] The "court" now has no judicial function whatsoever. It is merely a collection of three judges executing the law. While it might be argued that the allocation of an Executive function to judges acting in their capacity as individuals, not judges, would not violate the separation of powers, *see In the Matter of President's Commission on Organized Crime Subpoena of Scarfo*, 783 F.2d 370 (3rd Cir. 1986), it is beyond dispute that judges acting in their individual capacity, and not as members of a court, are not a "court of law" as described in Article II. Because they are not a court of law, they cannot exercise the appointment power in Article II. Congress's delegation of the appointment power to that entity exceeds the limits of its power under Article II, just as its delegation of the appointment power to itself was held to violate Article II in *Buckley* v. *Valeo*.

C. The Necessary and Proper Clause Does Not Allow Congress to Circumvent Article II.

As a ground for reversal of the court of appeals, *Amici Curiae* Lawrence E. Walsh and Burton D. Linne maintain that the Necessary and Proper Clause of the Constitution "provides explicit textual authority for Congress to enact an independent counsel statute that it rationally deems necessary . . ." (Walsh Brief at 2), and that the Act is therefore constitutional. This argument squarely conflicts with the basic principle, articu-

[31] Under the amendments, review may be had in the district court, not the special court. *See* Pub. L. No. 100-101, § 2, 101 Stat. 1293, 1305 (1987).

lated by this Court in *Buckley* v. *Valeo*, 424 U.S. at 134-36, that the Necessary and Proper Clause does not authorize Congress to do what the Constitution otherwise precludes it from doing, whatever the policy reasons for Congress's actions. In *Buckley* v. *Valeo*, this Court rejected this very argument, bluntly ruling:

> Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

Id. at 135. Congress has no power to enact a statutory mechanism that violates the separation of powers or any other constitutional principle. Since *Buckley*, this Court has repeatedly denied Congress's authority to pass legislation in violation of the separation of powers, even in aid of Congress's own enumerated powers. *See, e.g., INS* v. *Chadha*, 462 U.S. at 940-41 (Congress's power over naturalization). There is no warrant for its doing so in aid of power vested in *another* branch of government.[32]

III. THE APPOINTMENT OF ASSOCIATE COUNSEL IS UNCONSTITUTIONAL.

In *Buckley* v. *Valeo*, *supra*, this Court held that Officers of the United States must be appointed in the manner prescribed in Art. II, § 2. The associate counsel appointed by the independent counsel are exercising the

[32] As a logical extension of the argument advanced by *amici*, Congress could freely limit the President's pardon power with respect to members of the Cabinet, or limit the President's power to enter into certain kinds of treaties, if Congress merely *rationally* perceived those limits to be an aid to the Executive's faithful execution of the laws. Precedents in this Court squarely refute Congress's authority to carve up the Executive function whenever it can articulate a rational basis—or any basis—for doing so. *See, e.g., Ex Parte Garland*, 4 Wall. 333 (1867).

powers of Officers of the United States, but they were appointed by the independent counsel, not in the manner prescribed by Article II. This case is on all fours with *Buckley* v. *Valeo*, and the same result must follow: the associate counsel may not exercise the powers unconstitutionally assigned to them. The staff attorneys are for all intents and purposes Assistant U.S. Attorneys or their superiors. They may appear before the grand jury, sign subpoenas, sign pleadings, and argue in court. As the equivalent of Assistant U.S. Attorneys, they exercise *at least* the degree of discretion and authority, in determining whom and what to subpoena, and in conducting grand jury and court proceedings, as the judicial clerks and third-class postmasters held to be inferior Officers in *Buckley* v. *Valeo*.

Under Article II, these Officers must be appointed by the President with the advice and consent of the Senate or, if Congress has so provided, by the President, a court of law (subject to the constraints outlined in Part II.B, *supra*), or a department head. Appellant is neither a President, a court of law, nor a department head.[33] The parallel to *Buckley* v. *Valeo* is straightforward.[34] Congress cannot empower a private individual—or even an inferior Executive Officer—to exercise the appointment power under the excepting clause of Article II any more than Congress itself can exercise such power. In *Buckley*, the improperly authorized exercise of power by the appointees had to cease. So must it here.

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[33] Independent counsel exercises *at least* the authority of a department head but is not a department head for constitutional purposes because she was not appointed as one must be—by the President with the consent of the Senate.

[34] It is notable that the Act nowhere provides for the removal of members of the independent counsel's staff. Presumably, appellant is empowered to remove them at will; it is far from certain whether the Attorney General may do so at all, or if so, under what circumstances.

IV. THE REMOVAL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT ARE UNCONSTITUTIONAL.

The President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity . . . includ[ing] the enforcement of federal law . . . and management of the Executive Branch—a task for which 'imperative reasons requir[e] an *unrestricted power [in the President] to remove* the most important of his subordinates in their most important duties.'" *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982) (quoting *Myers* v. *United States*, 272 U.S. 52, 134-35 (1926)) (emphasis supplied). The Ethics Act severely restricts the Executive's authority to remove the independent counsel and subjects any attempted removal to *de novo* judicial review. *See* 28 U.S.C. § 596(a)(1). The Act requires that any attempted removal be accompanied by a written explanation to the special court and to Congress, and it gives the court jurisdiction to review the removal for any error of fact or law and to rescind it. These statutory provisions collide directly with basic separation-of-powers principles and are unconstitutional.

As this Court recounted in *Bowsher* v. *Synar*, 106 S. Ct. at 3187,[35] the First Congress considered the President's removal authority during debate on bills establishing the Executive Branch departments. The issue was whether the President should have absolute authority to remove Department Heads, without the advice and consent of the Senate. In the "Decision of 1789," Congress determined that under the Constitution the removal authority belongs to the President alone. Because

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[35] As *Bowsher* made clear, it is appropriate to review a removal provision that creates "here-and-now" subservience to another branch and thereby raises separation-of-powers problems. 106 S. Ct. at 3189 n.5. Given the relationship of the independent counsel to the special court and that court's ability to overrule the Attorney General and reinstate the independent counsel, those concerns are present here as well. *See also* J.S. 43a n.36 (discussing additional problem of "here-and-now" freedom from Executive control created by removal restrictions).

this decision represents a nearly contemporaneous construction of the Constitution by a Congress composed of many members of the Constitutional Convention, it is entitled to great weight. *See id.*; *Parsons* v. *United States*, 167 U.S. 324, 328-30 (1897). This Court has described the Decision of 1789 as "the settled and well-understood construction of the constitution," *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

In *Myers* v. *United States*, 272 U.S. 52 (1926), this Court first confronted the issue of the President's power to remove top Executive officials when it was asked to rule on a statute providing for the discharge of postmasters by the President with the advice and consent of the Senate. In a comprehensive opinion holding the statute unconstitutional, the Court ruled that Congress cannot interfere with the President's performance of his duty to execute the laws by limiting his control over his subordinates. For Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." *Id.* at 161. Chief Justice Taft explained:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.
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> Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . .

Id. at 117, 163-64.

A decade later, in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), this Court considered the authority of Congress to limit the President's power to remove a Federal Trade Commissioner. The relevant statute provided for removal by the President but only for "inefficiency, neglect of duty, or malfeasance in office." The President, however, had sought to remove the commissioner because of policy differences between them. This Court upheld the statute's restriction on the President's removal authority, ruling that an "illimitable power of removal is not possessed by the President [with respect to Federal Trade Commissioners]." *Id.* at 629 (quoted in *Bowsher*, 106 S. Ct. at 3188). The Court reasoned that, unlike a postmaster who is "an executive officer restricted to the performance of executive functions," the FTC commissioner exercises "quasi-judicial" and "quasi-legislative" powers, 295 U.S. at 624, and is "wholly disconnected from the executive department." *Id.* at 630.[36] Although it carved out an exception for Officers who exercise "no part of the executive power vested by the Constitution in the President," *id.* at 628, and over whom the President might therefore have less than full control, the Court reaffirmed the holding in *Myers* that congressional participation in the removal of

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[36] Thereafter, in *Wiener* v. *United States*, 357 U.S. 349 (1958), the Court concluded that under *Humphrey's Executor*, the President did not have unrestrained removal authority over a member of the War Crimes Commission, in light of the "intrinsic judicial character of the task with which the commission was charged." *Id.* at 355. *Wiener* reaffirmed the President's illimitable power of removal of "purely executive officers." *Id.* at 352.

"purely executive officers" is unconstitutional. *Id.* at 627-28.[37]

Most recently in *Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986), this Court held that the Comptroller General's exercise of Executive functions under the Balanced Budget and Emergency Deficit Control Act of 1985 (known as the "Gramm-Rudman-Hollings Act") violated separation-of-powers principles because the Comptroller General is not removable by the Executive but only by a Congressional Joint Resolution or by impreachment. Congress, the Court held, may not retain the power of removal over an Officer executing the law, such as the Comptroller General, other than by impeachment.

The Ethics Act violates these principles. First, it limits the grounds on which the independent counsel may be removed by the Attorney General. Since the independent counsel exercises core Executive functions, and no "quasi-judicial" or "-legislative" functions, under *Myers* she must be removable at will by the Executive. The independent counsel, after all, does not merely execute the Ethics in Government Act, *compare Bowsher*, *supra*; *see* J.S. 50a (functions of independent counsel carry "more—much more—Executive discretion than the specific duties" at issue in *Bowsher*). She has the power to investigate violations of, and bring prosecutions under

[37] This principle precludes not only direct congressional involvement in removal of core Executive Officers, but also congressional limits on Executive discretion to remove those Officers. In *Morgan* v. *Tennessee Valley Authority*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941), the Sixth Circuit upheld the President's authority to remove at will the Chairman of the TVA's Board of Directors, overruling a congressional effort to impose limits on the President's discretion. Congress had sought to reserve to itself exclusive discretionary power to remove a director and had imposed on the President a mandatory duty to remove for stated causes, and for those causes only. *Id.* at 991. Because administration of the TVA was an Executive function and the chairman's powers were not adjudicative, the court held that the President was constitutionally empowered to remove the chairman at will.

all the criminal laws of the United States and to do so without any guidance from the Executive Branch. Such an Officer must be removable at will by the President.

Second, the Act intrudes the court and Congress into the removal process in clear contravention of *Bowsher's* admonition against the direct involvement of the other branches in the removal of Executive Officers. The Attorney General must submit a report to Congress and the special court detailing the facts found and ultimate grounds for removal. 28 U.S.C. § 596 (b). The special court may then review the removal *de novo* and reinstate the independent counsel. *Id.* § 596(c). The result is to permit a judicial veto of the removal decision; the court could simply reinstate an Officer found by the Executive to be unsatisfactory for any number of policy reasons. Under the Constitution, however, neither the court nor Congress may properly become so entangled in the execution of the laws.

The court's power to review and reject the Attorney General's removal decision is on all fours with a *congressional* power to advise and consent to an independent counsel's removal—a right the First Congress rejected as unconstitutional. That Congress recognized that a requirement of Senate concurrence might clash with the Executive's constitutional duty and therefore could not be countenanced. As Rep. Boudinot stated:

> If the President complains to the Senate of the misconduct of an officer, and desires their advice and consent to the removal, what are the Senate to do? Most certainly they will inquire if the complaint is well founded. To do this, they must call the officer before them to answer. Who, then, are the parties? The supreme Executive officer against his assistant; and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he

> is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the constitution, to prevent his having officers imposed upon him who do not meet his approbation?

1 *Annals of Congress* 487 (June 16, 1789). The flaw is the same here: removal from the Executive of the tools to perform his constitutional duty, with the consequent diminution in his power and expansion of that of other branches. The law never has been, and logically ought never to be, that Congress may freely remove from one branch the power constitutionally entrusted to it, and relocate it, as long as the result is not a direct, but only a comparative, increase in congressional power.[38]

This Court's precedents establish that the Executive must have the authority to remove at will Officers exclu-

[38] The change in the provisions for judicial review of removal decisions to which appellant and *amici* refer—placing jurisdiction over the civil action for reinstatement in the District Court for the District of Columbia rather than the special court, and narrowing the standard of review—do not affect the constitutional analysis, and in fact create rather than eliminate constitutional infirmities. Appellant and amici overstate the effect of the recent amendments to these provisions on the Act's unconstitutionality. The Act would still prohibit removals at will. A court (albeit not the "special court") still may review a removal decision and may reinstate the official if the removal is deemed improper. The Conference Report on the amendments reaffirms that the "good cause" limitation is meant to "protect[] the independent counsel's ability to act independently of the President's direct control" and that removals are only permitted "for misconduct." *Independent Counsel Reauthorization Act of 1987*, H.R. Conf. Rep. 452, 100th Cong., 1st Sess. 37 (1987). The Report also indicates that an independent counsel may disobey any presidential order that interferes with the integrity of the proceedings. *Id.* Thus, if the President determines that national security or foreign policy concerns outweigh the need for a criminal prosecution, the independent counsel presumably is free to disagree. At least one independent counsel already has adopted this interpretation. *See* J.S. 57a-58a. *See also* Seymour Brief at 10 (describing "[a]rms-length negotiations" held with executive agencies regarding declassification).

Moreover, as noted at Part II.B, *supra*, removal of the special court's jurisdiction creates additional constitutional problems.

sively exercising core Executive functions, and that no branch of government may aggrandize itself by limiting that removal authority or otherwise intruding into the process. As the court of appeals held, the Ethics Act violates these principles and cannot stand.

V. THE SPECIAL COURT'S EXERCISE OF THE POWER TO APPOINT, DEFINE JURISDICTION, AND SUPERVISE VIOLATES ARTICLE III.

Article III courts must " 'carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution.' " *Muskrat* v. *United States*, 219 U.S. 346, 355 (1911) (citation omitted). Nothing in the Constitution authorizes courts to appoint a prosecutor, define the scope of a criminal investigation, or supervise a criminal investigation. The special court nonetheless performs these non-judicial duties under the Act. Because Congress may not constitutionally vest in Article III courts powers beyond those "clearly confided" to them by the Constitution, the court of appeals correctly ruled that the special court's acts are unconstitutional.

In response, appellant and those few *amici* who address this basis for the ruling below maintain that Congress may expand the authority of courts beyond that provided in Article III, even to encroach on the Executive's Article II powers, when Congress deems that expansion to be a "necessary" incident of the court's Article II appointment power. *See, e.g.*, Brief for Appellant at 43-45; Brief for *Amicus Curiae* Public Citizen at 9. This analysis, which relies on a grossly understated vision of the role of the special court, is entirely unsupported. Not a single case, commentary, or other authority is cited to suggest that Congress may willy-nilly expand the limited appointment power given to courts under Article II and thereby violate the limits of Article III or any other constitutional provision. In fact, the law is directly to the contrary. *See* Part II.C, *supra*.

It is well established that Congress may not assign to judges holding office under Article III executive or ad-

ministrative duties of a non-judicial nature, and that the courts may not exercise such power if granted. *See Buckley* v. *Valeo*, 424 U.S. at 123; *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Ex Parte Siebold*, 100 U.S. at 398; *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).[39] The judicial power of the courts is limited to cases and controversies. *Muskrat*, 219 U.S. at 356. "Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred." *Id.* It also is "elemental that there must be parties before there is a case or controversy." *Ellis* v. *Dyson*, 421 U.S. 426, 434 (1975). *See also Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U.S. 716, 724 (1929).

A principal purpose of the "case or controversy" limit on judicial power is " 'to assure that the federal courts will not intrude into areas committed to the other branches of government.' " *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 395-96 (1980) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)). The Ethics Act thrusts a panel of judges directly into areas committed to the Executive and delegates to them duties that bear none of the indicia of cases or controversies.

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[39] *Hayburn's Case* concerned a statute vesting in the courts of appeals the power to settle pension claims of widows, orphans and invalids, subject to review and revision by the Secretary of War and Congress. A change in the law rendered the case moot, but this Court's reporter published opinions of three circuit judges, including Justices Iredell and Jay, who had protested the act or refused to act under it. The opinions concluded that the statute violated the separation of powers to the extent it required judicial Officers, acting in that capacity, to perform tasks that formed no part of Article III powers and subjected their decision to review by the Executive. *See United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 49-51 (1852) (discussing *Hayburn's Case*).

This Court later decided that since the power delegated by statute was not judicial power within the meaning of the Constitution, but nonetheless was intended by Congress to be executed as a judicial function, the statute was unconstitutional. *See United States* v. *Yale Todd*, 54 U.S. (13 How.) 52 (1794) (note following *Ferreira*).

The package of non-judicial powers entrusted to the special court is substantial. On its own, the court compiles a list of possible candidates for the job of independent counsel. It delegates to a private attorney the extraordinary assignment of acting as the Attorney General of the United States with respect to a certain group of activities—an individual who, unlike the real Attorney General, need not heed the direction of the President with respect to law enforcement or other policy issues. The special court then defines this attorney's investigative and prosecutorial jurisdiction, thereby stripping the Attorney General of his power and placing it instead in an office of its own creation. In performing this task, the special court is not bound by the request of the Attorney General. Contrary to appellant's assertion (at 44), the court freely second-guesses the Attorney General and expands the jurisdiction beyond that requested by the Attorney General in his application to encompass any matter the court believes appropriate.[40] In doing so, the court abandons

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[40] For example, in this matter the Attorney General requested that the court appoint an independent counsel to look into a narrow issue—whether Mr. Olson violated any federal criminal law when he made two unsworn statements to Congress. Attorney General Report at 2-3. The special court ordered a considerably broader investigation, however. The special court additionally authorized investigation into, and the prosecution of, any other violation of any federal law by Mr. Olson—whether or not related to or arising out of the events leading to the initial referral. The court later also "clarified" its original order to allow appellant to investigate an alleged conspiracy not included in the Attorney General's application. The lower courts have held that a court may not review or overrule the Attorney General's decision not to refer a case to an independent counsel. *See Nathan* v. *Smith*, 737 F.2d 1069 (D.C. Cir. 1984). Yet the special court has done exactly that by initiating an investigation of matters other than those specifically referred to it by the Attorney General.

In at least two other independent counsel investigations, the special court also expanded the jurisdiction of the independent counsel beyond that requested by the Attorney General: in the investigation of Michael K. Deaver, and in the investigation of Oliver L. North. As noted at note 24, *supra*, in the latter of these, the expansion followed, essentially verbatim, a request from Democratic

its Article III role as an impartial adjudicator to fulfill its assignment as Executive decision-maker. In abandoning a court's traditional role, the special court jeopardizes both the appearance and reality of judicial impartiality, which is a "central, constitutionally ordained, requirement[] of the federal judicial office." *In re Application of President's Commission on Organized Crime (Subpoena of Scaduto)*, 763 F.2d 1191, 1197 (11th Cir. 1985).

After defining the scope of the criminal investigation and empowering the independent counsel to proceed, the special court retains supervisory power over the independent counsel. In this capacity the special court already has exceeded the bounds of Article III by issuing advisory opinions on its own constitutionality, *see In re Olson*, 818 F.2d 34 (D.C. Cir. Div. for Purpose of Appointing Independent Counsels, 1987), and by issuing advisory orders that independent counsels and their staffs are employees of a "separate special agency" who need not adhere to DoJ conflict of interest rules. These rulings are not an exercise of Article III judicial power.

Before terminating her office, the independent counsel must submit to the court a full and complete description of her work, "including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted." 28 U.S.C. § 595 (b)(2). Until the independent counsel is in "full compliance" with this section, her office cannot terminate, *see* § 596(b)(1). The court must therefore review the stated reasons not to prosecute to assure that the independent counsel is in "full compliance" with the statutory mandate. This judicial role is in obvious conflict with

members of Congress for a broader investigation than that requested by the Attorney General. In the Deaver matter, the independent counsel received a request directly from Congress to investigate certain matters and then retroactively obtained the permission of the court to include those matters within its jurisdiction. *See* Motion of *Amicus Curiae* Michael K. Deaver for Leave to Participate in Oral Argument, No. 87-1279, at 4-5 (March 30, 1988).

the many cases holding that the Executive alone makes the decision not to prosecute, and that courts shall not review any such decision.[41]

In the event of removal of the independent counsel by the Attorney General, the Attorney General must file with the court "a report specifying the facts found and the ultimate grounds for such removal," § 596(a)(2), which the court may make public in whole or in part, again at its own discretion and for its own reasons. Under the pre-amendment Act, the independent counsel may obtain *de novo* review of the removal before this same court that appointed her, and may obtain reinstatement if the removal "was based on error of law or fact." In other words, the Act requires the Executive to justify the decision to remove a top Officer, and it authorizes the special court to review the removal decision *de novo*, to substitute its own understanding of good cause for that of the Attorney General, and to reverse the Executive's decision as to Executive personnel. "Such a decision would likely turn on issues of public policy, for example, the appropriate limitations to be placed on a prosecutor's zeal, that are beyond traditional judicial competence," J.S. 54a. In short, "the word 'review' is a misnomer; the Special Court is basically a 'superior and revising agency' with a veto over the Attorney General's decision." J.S. 55a-56a.

Given the non-judicial character of the special court's work, it is hardly surprising that the court does not function like a court. Courts sit to decide cases or controversies, but the special court rarely has held an ad-

[41] Moreover, the special court decides whether to release to Congress and the public the independent counsel's final report—in other words, it determines the extent to which the independent counsel it has appointed shall be accountable to the public and its representatives, and the extent to which the public shall remain uninformed. *See* § 595(b)(3). The Act provides no criteria on which to base this decision on disclosure, and the special court is required to establish none; and unlike any other lower federal court, the decision of the court apparently is unreviewable.

versarial proceeding. Courts traditionally are open to the public, but the special court has never convened in public. It is not known to what extent there are hearings, motions, or rules of court because proceedings routinely are conducted in secret. The court does not even maintain a public docket. And unlike other courts, the special court's discretionary decisions are completely unreviewable.[42]

Equally disturbing is the political role into which the Act inevitably thrusts members of that court. The matters that give rise to calls for independent counsels invariably are highly charged and intensely political. The Act forces judges to take sides on these issues when they decide whom to appoint and what jurisdiction to authorize but, although acting as a court, they have no judicial precedent to use as guidance. Personal opinions and politics necessarily come into play as the criteria of decisionmaking. For example, assuming the court is unable to locate an independent counsel who is politically neutral, the court by its selection creates the very same conflict feared by the appellant and *amici*: an independent counsel who either bends over in favor of or against the current Administration. The same is true when it overrules the Attorney General's proposed jurisdiction at the behest of Congress. And, precisely because their role is a public one, judges of that court have granted interviews on matters pending before the court and have testi-

[42] The role of the special court may not be reconciled with Article III by reference to the participation of individual judges on panels such as the Sentencing Commission. *See* Brief of *Amicus Curiae* Public Citizen at 10. Lower courts have rejected separation of powers attacks on such panels by holding that judges sit on them in their private capacities. *See In the Matter of President's Commission on Organized Crime Subpoena of Scarfo*, 783 F.2d 370 (3rd Cir. 1986). Whether or not that very different activity is constitutional is irrelevant to the present question, which necessarily centers on the constitutionality of a *court's* exercise of executive powers. Only a "court of law," and not a group of judges acting in their non-judicial capacities, can constitutionally exercise the appointment power under Article II's excepting clause.

fied before Congress to make known their views on matters pertaining to the court. These activities only highlight the manner in which the Act's realignment of constitutional powers draws the courts into the political fray.

The special court's many and varied activities constitute no less than the exercise of Executive and Legislative power by a court and bear no relationship to the neutral resolution of adversarial proceedings contemplated by Article III. They are, quite plainly, not "judicial" within the constitutional meaning of the term and are therefore null and void. *See also Ex Parte Siebold*, 100 U.S. at 398 (certain decisional roles imposed on courts are not judicial and are therefore void).

VI. THE STATUTORY SCHEME AS A WHOLE VIOLATES THE SEPARATION OF POWERS.

The constitutional infirmity of the independent counsel provisions is particularly apparent when they are considered as a whole. Under the Ethics Act, the independent counsel performs functions that constitute "execution of the law in constitutional terms," *Bowsher* v. *Synar*, 106 S. Ct. at 3192, but she is not a member of the Executive Branch by any plausible criteria. Instead, under the Act, she is accountable to, and under the direction of, the legislature, the courts, and herself. Through creation of a web of judicial and congressional supervision and direction, the Act divests the President of control over an Officer exercising the core executive function of interpreting, in the name of the United States, all the laws of the United States and of prosecuting, also in the name of the United States, offenses against the United States.

The Ethics Act establishes a "statutorily required relationship [between the independent counsel and] the Legislative [and Judicial] Branch[es]," *Bowsher* v. *Synar*, 106 S. Ct. at 3196 (Stevens, J., concurring), and it thereby intrudes the Judicial and Legislative Branches into the function of executing the laws. With respect to the Legislative Branch, for example, the Act contains detailed

reporting and other obligations that render the independent counsel directly accountable to it, and, at the same time, circumvent Executive claims of Executive privilege that might be interposed. Thus, the Act requires that the independent counsel "*shall* send to the Congress" (28 U.S.C. § 595(a) (emphasis supplied)) periodic statements or reports on her activities, which need not be made public, thereby assuring day-to-day oversight of the execution of the laws. In the same vein, the Act provides that appropriate congressional committees "*shall* have oversight jurisdiction with respect to the official conduct of any independent counsel" (§ 595(d) (emphasis supplied)), and that the independent counsel "*shall* have the duty to cooperate with the exercise of such oversight jurisdiction." *Id.* (emphasis supplied). In a provision that renders the independent counsel an agent of the House, the Act further requires that the independent counsel "*shall* advise the House of Representatives of any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment." § 595(c) (emphasis supplied). Moreover, certain members of Congress may request the appointment of an independent counsel and, if they do, the Attorney General is *required* to respond to their request and, if an independent counsel is not sought, he *must* explain why the application was not made. § 595(e). And, if the Attorney General removes an independent counsel, he must "promptly" submit to congressional committees "a report specifying the facts found and the ultimate grounds for removal." § 596(a)(2). These provisions create an unprecedented legislative entanglement in the execution of the criminal laws and demand from an independent counsel allegiance and accountability to Congress far in excess of that owed to the Executive.

The role of the special court is even more intrusive. The Executive's authority to define the scope of a criminal investigation is subject to expansion by the special court, which is statutorily entrusted with defining an independent counsel's jurisdiction. § 593(b). The Attorney General's statutorily constrained ability to remove the independent counsel is subject to judicial review with apparently no deference, and to reversal. § 596(a). As the court of appeals stated, it is as if the Attorney General must apply to the special court before he may remove the independent counsel (J.S. 56a), and the special court may issue an unexplained, unreviewable, refusal. And before terminating her inquiry, the independent counsel *must* submit to the court a detailed report describing the work of the independent counsel, "including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted." § 595(b)(2).

To approve this Legislative and Judicial intrusion into the Executive arena would be to overlook 200 years of development of separation of powers principles, culminating in this Court's recent decisions containing the powers of the respective branches. This is not a case in which appointment but not removal, or removal but not appointment, of an Executive Officer is located outside the Executive Branch of government, thereby merely diminishing the ability of the Executive to control the execution of the laws.[43] On the contrary, this is a case in which the President and Attorney General are to an unprecedented degree divested by Congress of virtually all appointment, supervisory, and removal authority in an area of government that is constitutionally entrusted to them, with a resulting, serious imbalance of authority among the branches. "If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power

[43] The Court need not consider whether the head of an agency may be removed only "for good cause"—an issue on which many *amici* focus—unless it disagrees with the court of appeals' other rulings on Article II, and Article III, and the infirmities in the statute as a whole.

and it all belongs to the Executive." *Nathan* v. *Smith*, 737 F.2d at 1079 (Bork, J., concurring). In attempting to carve up the Executive's law enforcement power and purporting to hand a healthy slice to independent counsels, Congress ignored this basic constitutional principle.

It is no answer to assert that this scheme is acceptable because Congress has not aggrandized Executive power *to itself*. This argument assumes that the separation of powers may be violated only where Congress itself usurps a function entrusted to another branch. In fact, the separation of powers may be violated in other ways: "One branch may interfere impermissibly with the other's performance of its constitutionally assigned function," or "one branch [may] assume[] a function that more properly is entrusted to another." *INS* v. *Chadha*, 462 U.S. at 963 (Powell, J., concurring). Both of these are violated here. First, as is described *supra*, in numerous ways Congress affirmatively has sought to assume for itself, and more blatantly for the special court, both direct and indirect control over the independent counsel's execution of the law. Second, by divesting the Executive of its authority and shifting that authority to a "fourth branch" variously accountable to the court and Congress (but not to the people), Congress *necessarily* diminishes the power of the Executive and thereby "interfere[s] impermissibly with the [Executive's] performance of its constitutionally assigned function." *INS* v. *Chadha*, 462 U.S. at 963 (Powell, J., concurring). One can easily imagine the other Executive activities Congress might transfer to such an "independent" counsel, such as the judicial appointment power, or control of Central American affairs, under the guise of non-aggrandizement.

Nor does a perceived political exigency justify Congress's alteration of the balance of power among the branches.[44] *INS* v. *Chadha*, 462 U.S. at 944; *Bowsher* v.

[44] The need for legislation cannot save legislation that violates the separation of powers, and *Nixon* v. *General Services Administration*, 433 U.S. 425 (1977), which is cited in briefs in support of

Synar, 106 S. Ct. at 3193-94; *Buckley* v. *Valeo*, 424 U.S. at 134. The Framers were well aware that a high Executive Officer might commit an offense against the state, and that that possibility might create special problems for the Executive.[45] They accordingly provided means by which Congress might hold the Chief Executive and his agents accountable to the people for any failure to prosecute wrongdoers without divesting the Executive of its duty to execute the law. Congress's power to investigate and censure, power of the purse, power to withhold consent to nominations, and power of impeachment, give it more than ample means to prevent, ferret out and remedy abuses of power. The impeachment power, in fact, was meant to address the very concerns raised:

> The power of impeachment will generally be applied to persons holding high offices under the government; and *it is of great consequence, that the president should not have the power of preventing a thorough investigation of their conduct, or of securing them against the disgrace of a public conviction by impeachment, if they should deserve it. The constitution has, therefore, wisely interposed this*

the Act, is not to the contrary. That case rejected a separation-of-powers challenge to a law giving to the General Services Administrator, *an Executive Officer*, control over certain presidential documents. The statute did not divest the Executive of any authority; by statute the Administrator remained subject to the direction and control of the President. *See* 40 U.S.C. § 751(a); 433 U.S. at 444. The statute at issue merely assigned certain Executive duties to the Administrator's office. This Court established a balancing test to review legislation affecting the *organization* of the Executive Branch. *Nixon* did not involve alleged violations of the Executive's Article II appointment or removal powers or of Article III, and the *Nixon* analysis is not applicable. *Bowsher*, *Chadha*, and *Buckley* are the analogous cases, and in none did this Court consider the need for the legislation, or perform a balance, after identifying a violation of Article II or the separation of powers.

[45] Indeed, the fact that the perceived conflict of interest is "inherent" in our constitutional scheme is a basis for rejecting Congress's effort to remove the conflict, not for upholding it. *See* J.S. 64a-65a.

> *check upon his power, so that he cannot, by any corrupt coalition with favorites, or dependents in high offices, screen them from punishment.*

2 J. Story, *Commentaries on the Constitution of the United States* § 1501, at 368 (1858) (emphasis supplied). In other words, the Constitution provides Congress with the weapon of impeachment to use first as a threat, to assure compliance by the Executive with the laws, and thereafter, if necessary, either to investigate and punish offenses by persons akin to those covered by the Ethics Act, or to punish the Chief Executive for his failure to prosecute such offenses himself. There is no authority for Congress's bald decision to assume, *before the fact*, that the Executive will be unable to act properly and, on that basis, to remove from the Executive responsibility for the execution of the laws. The Constitution's mechanism for dealing with an Executive failure to act properly is the ballot box or, if need be, impeachment, not an independent counsel statute premised on hypothetical failures.

This Court recognized early on that the problem of executing the laws with respect to senior administration officials is one that is constitutionally entrusted to the President to solve. If the President fails in this regard, he is accountable "only to his country in his political character and to his own conscience." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803). *See also* 1 Annals of Congress 480 (June 16, 1789) (Rep. Madison) (if the President abuses his power to execute the laws, his pardon power, or any other authority, "he is impeachable for any crime or misdemeanor before the Senate, at all times; and . . . he is impeachable before the community at large every four years, and liable to be displaced if his conduct shall have given umbrage during the time he has been in office."). These constitutional checks and balances have worked for two centuries and provide Congress and the people ample means to assure that corrupt government officials are investigated and prosecuted. Even if "necessity" could, as a constitutional matter, justify a violation of separation of powers, there is no "necessity" here.[46]

There also is no reason to assume that the Department of Justice has an irremediable conflict of interest that demands congressional and court intervention when an investigation involves senior Executive Officers. *People* in the Department, but not the Department itself, may well have conflicts of interest. If they do, it is their legal and ethical duty to recuse themselves. This does not mean that every member of the Department—such as United States Attorneys or the attorneys in the Office of Professional Responsibility, whose charter is to conduct sensitive investigations—has a conflict of interest. The willingness with which two court-appointed independent counsels have embraced and relied upon "parallel" appointments from the Department of Justice, while claiming to retain independence equal to that enjoyed under the Act, belies any argument to the contrary. The Act reflects not an existing exigency, but Congress's distrust of the Executive to abide by applicable conflict of interest rules and to develop solutions where routine prosecutions might be suspect. Only by endorsing this congressional expectation of an Executive failure to adhere to the oath of office could this Court even think that a need for this Act actually exists.

The Constitution entrusted the execution of the laws to the President, and with him it must lie. The Ethics Act's rearrangement of the powers of government is unconstitutional, and the actions of the independent counsel thereunder are consequently void.

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[46] There is, moreover, no basis for believing that extant processes are unworkable. First, the history recounted at length by *amici* demonstrates that the Executive is capable of solving the problem by establishing an "independent" entity to investigate Officers. Second, the congressional investigation into the sale of weapons to Iran and the alleged diversion of proceeds to Nicaraguan insurgents, and the four-volume House Majority report that led to appellant independent counsel's investigation, confirm the ability of Congress to investigate Executive Branch officials.

VII. A MOTION TO QUASH A SUBPOENA IS A PROPER VEHICLE FOR CHALLENGING THE AUTHORITY OF THE INDEPENDENT COUNSEL.

Appellant asserts that the recipient of a grand jury subpoena may not challenge the authority of the prosecutor to cause issuance of the subpoena but instead must comply with the subpoena. Like every other court of appeals that has addressed this issue, the court below rejected this argument. It held that "a witness who has been subpoenaed by an independent counsel may obtain judicial review of the constitutionality" of the statute purportedly authorizing the conduct of the independent counsel. J.S. 9a n.6. The court also held that appellant had waived this argument by her failure to raise it in the district court. *Id.* Both rulings of the court of appeals were correct.

At the outset, appellant's argument ignores the nature of the power whose unauthorized exercise she advocates. By causing issuance of a subpoena, filling it in, and seeking to enforce compliance with it, government officials invoke their most coercive powers. They threaten to deprive citizens of their liberty in order to compel them to act against their will, and to deprive them of their liberty if they refuse. For this reason, the lower courts uniformly have sought to assure that only properly authorized and supervised persons are permitted to exercise such enormous power. Under any articulation of a ripeness standard, the direct, imminent, and coercive impact of a subpoena squarely puts to the test the authority of the government officers involved.[47]

Not surprisingly, such challenges are expressly authorized both by the Federal Rules of Criminal Procedure

[47] Appellant's analogy to civil actions seeking declaratory and injunctive relief from unauthorized prosecutions is misplaced. Brief for Appellant at 27 n.26. Regardless of whether the burden of suffering through a criminal investigation constitutes immediate and cognizable injury, there never has been any claim that an exercise of the coercive power of the state does not constitute such injury to the party coerced.

and statute. First, Rule 17(c), Fed. R. Crim. P., provides that "[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." Compelled compliance with a subpoena caused to be issued, filled in, and enforced by an improper and unauthorized person is both unreasonable and oppressive. For this reason, district courts routinely have considered, on motions to quash, the lawful authority of Officers exercising coercive power.

Until now, this issue principally had arisen in a series of cases in which subpoenaed witnesses challenged the authority of a special government attorney to cause issuance of a subpoena. Those witnesses argued that the government attorney's appointment did not comply with the statutory requirements for appointment of special attorneys. In ruling on the merits of those claims, courts uniformly either expressly or impliedly held that such challenges are ripe for adjudication. As one court held: "Unauthorized parties cannot, and should not, be permitted to compel the attendance of prospective witnesses before a federal grand jury. Motions to quash grand jury subpoenas which have been issued pursuant to applications filed by an allegedly unauthorized government official cannot, therefore, be considered premature." *In re Grand Jury Subpoena (Patriarca)*, 396 F. Supp. 859, 863 (D.R.I. 1975).[48] A contrary ruling would represent a radical reversal of existing practice.

Second, 28 U.S.C. § 1826 authorizes a court to confine a witness who "refuses *without just cause shown* to comply with an order of the court to testify or provide other information. . . ." (emphasis supplied). An individual has "just cause" to refuse to comply with the purported

[48] *See also In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); *DiGirolomo* v. *United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975); *In re April 1977 Grand Jury Subpoena (General Motors Corp.)*, 573 F.2d 936 (6th Cir.), *appeal dismissed en banc*, 584 F.2d 1366 (1978), *cert. denied*, 440 U.S. 934 (1979); *In re Grand Jury Proceedings/Subpoenas*, 593 F. Supp. 92 (S.D. Fla. 1984); *In re DiPiero*, 394 F. Supp. 1350 (E.D. Pa. 1975).

exercise of government authority by people who have no right to exercise that authority. Judicial supervision is essential to assure that only properly authorized persons are permitted to exercise coercive power.

Appellant nonetheless imputes a talismanic quality to the fact that this case arises in the context of a grand jury investigation. She argues that a witness called before the grand jury cannot be permitted to "interfere with the functioning of the grand jury," Brief for Appellant at 25, and that the claim is not "forever lost" because an indicted defendant could raise it (even if an unindicted target or a witness would have lost it forever). *Id.* at 27. Thus, in her view, grand jury witnesses such as appellees Schmults and Dinkins (as opposed to grand jury targets) may be coerced by a person without any lawful authority into testifying or producing documents, on pain of incarceration for any failure to do so, without any recourse ever.

For this extraordinary contention, appellant relies on an unprecedented expansion of *Blair* v. *United States*, 250 U.S. 273 (1919). *Blair* held that a witness could not object to a grand jury subpoena by asserting the unconstitutionality of a statute that he speculated was the basis of the grand jury's investigation. This Court reasoned that a witness "is not entitled to set limits to the investigation that the grand jury may conduct." *Id.* at 282. The "question whether the facts show a case within [the grand jury's] jurisdiction" and, if so, the "precise nature of the offense . . . normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Id.* at 282-83 (citation omitted). It is purely speculative for a witness to anticipate answers to these questions by attacking a statute that might never be invoked against him. Instead, according to *Blair*, he must wait until the statute actually operates against him before challenging its legality.

A challenge to the lawful authority of a prosecutor to cause issuance of a subpoena is an entirely different

matter. The statute purporting to authorize appellant to cause issuance of subpoenas and compel compliance with them operates against the recipient of a subpoena as soon as the subpoena is received. Far from being speculative, the impact of the statute on the witness is immediate and concrete. Moreover, if the statute authorizing her conduct is unconstitutional, the prosecutor has no lawful authority to cause issuance of a subpoena, and the witness would receive the relief sought. There would be no way to compel compliance with the subpoena. *Blair* simply has no application in this context.

This Court's cases do not command lower courts to maintain an absolute hands-off policy toward the grand jury. For example, *United States* v. *Calandra*, 414 U.S. 338 (1974), which addressed Rule 17(c), established that when a subpoena would invade a legitimate privacy interest or otherwise appear unreasonable, "[j]udicial supervision is properly exercised in such cases to prevent the wrong *before* it occurs." *Id.* at 346 & n.4 (emphasis supplied). Similarly, in *United States* v. *Dionisio*, 410 U.S. 1, 11-12 (1973), this Court cautioned against deference of the kind appellant advocates, admonishing lower courts to protect against unconstitutional exercises of power in the grand jury context: "This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. . . . Grand juries are subject to judicial control and subpoenas to motions to quash." *See also Gravel* v. *United States*, 408 U.S. 606 (1972) (court has authority to rule on motion to quash and regulate grand jury to prevent Speech or Debate Clause violation).

In short, the decision to address appellees' constitutional claim is absolutely consistent with case law in this Court, is the uniform practice among the lower federal courts, and is correct.[49]

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[49] In any event, as the court of appeals ruled (at J.S. 9a n.6), appellant has waived this claim. She concedes that she did not question the procedural posture of this proceeding until the case

CONCLUSION

For the numerous reasons stated, the judgment should be affirmed.

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was in the court of appeals. The court of appeals correctly ruled that the procedural issue was not jurisdictional and that it had been waived by appellant's failure to raise it in a timely manner.

Appellant argues, however, that "issues of ripeness and standing implicate Article III's requirement of a 'Case or Controversy,' or prudential concerns for the avoidance of unnecessary constitutional decisions." Brief for Appellant at 28-29 (citations omitted). She then concludes that "such questions [as ripeness or standing] may not be 'waived.'" *Id.* at 29. This is a *non sequitur*. Only if the "prudential concerns" about ripeness affect the court's Article III power may they not be waived, but appellant, far from arguing that prudential concerns about ripeness affect a court's Article III jurisdiction, *distinguishes* prudential concerns from Article III requirements. For support, she cites cases involving standing. At bottom, appellant offers no reason to reject the court of appeals' conclusion that it had no duty to address the claim appellant belatedly raised.

Supreme Court, U.S.
FILED
APR 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR APPELLANT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR APPELLANT

I. THE STATUTORY SCHEME

Appellees seek to resurrect the statutory contruction of the majority below.[1] The effort is generally to denigrate the power of the Attorney General over the invocation of the process of the Act, and to depict the Special Division as engaged in "supervision" of the conduct of criminal investigations by independent counsels.[2]

A. Executive Branch Control

Appellees argue that the Attorney General possesses "unreviewable authority over the initiation of proceedings under the Act . . . only if he ignores both the literal terms of the statute and its explicitly declared intent." Olson Br. 31. It is true that the statute mandates application for the appointment of an independent counsel upon a finding by the Attorney General that there are "reasonable grounds to believe that further investigation or prosecution is warranted." Appellees ignore, however, the substantial degree of discretion lodged in the

[1] Interestingly, the Solicitor General does not.

[2] There are other proffered distortions as well. For example, appellees mount a baseless attack on 28 U.S.C. § 595(e), which requires that the Attorney General respond in writing to any request for an application for an indepedent counsel from a majority of the members of either party of the Judiciary Committee of the House or the Senate. *See* Olson Br. 11 n.27, 30-31; Schmults Br. 50. The provision merely acknowledges that Members of Congress, like ordinary citizens, can bring to the attention of the Attorney General information which in their judgment would justify the appointment of an independent counsel. It is for the Attorney General alone to decide whether to apply for the appointment of an independent counsel. *See* 28 U.S.C. §§ 592(a)(1), (b)(1). Thus only he can "trigger" the statutory process. The fact that the Attorney General must report his actions to the requesting Committee members under § 595(e) does not render the provision obnoxious. Our laws are replete with requirements that the Executive Branch report upon its law enforcement efforts to the Congress, *see, e.g.*, 42 U.S.C. § 2000aa-11(b); 28 U.S.C. § 522; 28 U.S.C. § 529, requirements which obviously serve legitimate legislative goals, *see McGrain v. Daugherty*, 273 U.S. 135 (1927).

Attorney General and the fact that his decision is not subject to review by any authority. That discretion includes the power to determine whether the factual allegations, if true, are sufficient to constitute a violation of the law, 28 U.S.C. § 592(a)(1), and whether they are as a matter of fact sufficiently specific and credible to warrant formal investigation, 28 U.S.C. §§ 592(a)(1)(A), (B). The Attorney General also decides whether the results of any preliminary investigation he orders warrant further investigation or possible prosecution. 28 U.S.C. §§ 592(b)(1), (c)(1). Moreover, in doing so, he must "comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws." 28 U.S.C. § 592(c)(1). In other words, the Attorney General is to exercise his prosecutorial discretion at this stage of the investigation just as he (or his subordinate) does in every case.

It is no objection that the preliminary investigation is limited as to time and scope, or that Congress has made clear its intent that the Attorney General invoke the statutory process in the absence of a clear determination that there are no grounds to proceed. Congress justifiably concluded that criminal investigations can be compromised by the injection of political considerations at very early stages,[3] and thus directed that the substantive investigation, as well as any resulting prosecution, be conducted by the independent counsel, not the Attorney General. Similarly, the very nature of the problem to which the statute is addressed—the existence of a disabling conflict or the potential for one in the Department of Justice—counsels insistence that close calls be made in favor of further investigation.

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[3] At the outset of the Watergate investigation, for example, Justice Department officials, doubtless acting in good faith, kept the White House informed of the progress of the investigation and the proceedings of the grand jury, which greatly facilitated the conspiracy to obstruct justice. *See* H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 104-15 (1974).

The fact remains, however, that the procedures of the Act can only be invoked where the Attorney General himself has affirmatively determined that a reasonably prudent prosecutor would proceed, and he brings to that determination all the discretionary powers which he brings to any case. Attorneys General have displayed no reluctance to exercise those powers to pretermit potential investigations of high Administration officials.[4] The Executive Branch thus retains the exclusive keys to the statutory process.

Appellees make much of the Division's power to "define [the] independent counsel's prosecutorial jurisdiction," 28 U.S.C. § 593(b), which they claim both diminishes Executive Branch prerogatives and entangles the judiciary in the prosecutorial process. Properly viewed, it does neither.[5]

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[4] Not only did the present Attorney General foreclose investigation of appellees Schmults and Dinkins on the basis of a threshold finding that they lacked criminal intent, but he declined to seek the appointment of independent counsels in cases involving allegations concerning the conduct of Ambassador Faith Whittlesey and Circuit Judge Douglas H. Ginsburg when he was a member of the Justice Department. *See* H.R. Rep. No. 100-316, 100th Cong., 1st Sess. 26 (1987); N.Y. Times, Feb. 11, 1988, p. A-17, col. 1. *See also Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984); *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984).

[5] Appellee Olson claims that the subpoena *duces tecum* issued to him should be quashed because it seeks evidence of an alleged conspiracy to obstruct the House Judiciary Committee's investigation, which he asserts is not within the independent counsel's jurisdiction. First, this argument incorrectly reads the subpoena to call for documents exclusively relevant to the conspiracy allegation. Any of the documents may be relevant on the issues of whether appellee's testimony was true or whether it was obstructive of the investigation wholly aside from any conspiracy allegation. Second, on its face, the Attorney General's Report referring this matter to the Division contradicts Mr. Olson's jurisdictional thesis. The Report requested appointment of an independent counsel to investigate whether, as the Committee alleged, specified aspects of appellee's testimony "violated 18 U.S.C. §§ 1505, 1001, *or any other provision*

In the first place, it is the Division's settled interpretation of the Act that it may not grant to an independent counsel jurisdicion over allegations which the Attorney General has considered and rejected as not warranting further investigation. *In re Olson*, 818 F.2d 34, 47 (D.C. Cir. Indep. Couns. Div. 1987); *see* Appellant's Br. 18-19. Appellees' reliance upon the Division's order in the Iran/Contra matter—which has never been challenged (indeed, has arguably been ratified) by the Attorney General—is misplaced in light of the later ruling, following argument by the Attorney General and appellees, in *In re Olson*.[6] *See* Appellant's Br. 18-19.

Second, it would not destroy the constitutionality of the Act if the Division did differ within limits from the Attorney General in the definition of the independent counsel's jurisdiction. Congress presumably lodged the power to define jurisdiction in the Division as a safeguard against the crippling of investigations by virtue of the very conflict of interest which justifies the statute's existence. Exercise of this power by the Division does not involve "supervision" of any aspect of the criminal investigation; delineating the boundaries of an investigation is a far cry from a decision whether prosecution

of federal criminal law." Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in the United States House Judiciary Committee Report, April 10, 1986, at 2-3 (emphasis added). The Report also recommended that the jurisdiction of the independent counsel include investigative and prosecutorial authority over "*any other matter related to that allegation*." *Id.* at 11 (emphasis added).

[6] Similarly unavailing is the suggestion by *amicus curiae* Michael K. Deaver that the Division's supplemental order in his case, permitting investigation and prosecution of perjury and obstruction of the independent counsel's investigation, rendered what he calls "the Division's prior decision in *In re Olson*" a "nullity for all practical purposes." Deaver Br. 15. The order of which Mr. Deaver complains (which was entered on December 16, 1986) *antedated* the decision in *In re Olson* (which was entered April 2, 1987), not the other way round.

should go forward. *Cf. United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). The power is plainly a necessary incident of the power to appoint, particularly where the office is created *ad hoc* to deal with a particular exigency. *See* J.S. App. 125a; Appellant's Br. 44-45. And the definition of the permissible scope of an investigation is qualitatively indistinguishable from ordinary judicial tasks such as passing upon prosecutorial applications for search and arrest warrants, adjudicating challenges to grand jury subpoenas and referring potential contempts of court to the Justice Department or to private counsel for investigation and possible prosecution. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987); Appellant's Br. 44-45.[7]

B. The Question of "Supervision"

Despite appellees' almost hypnotic repetition of the word "supervision," they have not pointed to a single provision of the statute which empowers the Division to influence, much less control, any aspect of the conduct of an investigation or prosecution by an independent counsel. This is for the simple reason that there is no such provision in the Act.

The aspect of the statute about which appellees most seriously complain ensures the independent counsel's independence from the Division, every bit as much as from the Executive and Legislative Branches. Section 594(a) expressly grants to an independent counsel with respect to all matters within his jurisdiction "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department

[7] This is not to say that there are no limitations, either statutory or constitutional, upon the Division's power to define an independent counsel's prosecutorial jurisdiction. The scope of such limitations, like so many of the questions which appellees press upon the Court, should be litigated in cases where they arise upon the record, and not in the abstract in the context of a facial challenge to the statute itself.

of Justice . . . ." Nothing in the Act purports to give the Division control over the exercise of any of these powers. It cannot direct that an indictment be sought or not be sought, or that a particular charge be included within or eliminated from an indictment or information, or that any witness be subjected to or shielded from interview, grand jury subpoena or any other form of scrutiny or process. It has no power over the design of the investigation, the grant of immunity, the process of plea bargaining or the conduct of litigation. In short, it has no "supervisory" authority whatever.

The examples of purported "supervisory" power to which appellees point are so far-fetched as to reveal the very weakness of their argument. Thus appellee Olson asserts, without citation, that "the statute requires the Division to receive and review periodic reports from independent counsel, and from the Attorney General . . . ." Olson Br. 17. However, nothing in the statute requires "periodic" reports on their activities to the Division by either the independent counsel or the Attorney General. The Attorney General is required to report to the Division only once, at the conclusion of his preliminary investigation, *see* 28 U.S.C. §§ 592(b)(1), (d)(1), to explain his application and facilitate appointment of an independent counsel, or to make a record of his reasons for declining to make such an application. Likewise, an independent counsel submits but one substantive report to the Division, at the conclusion of the investigation or prosecution. *See* 28 U.S.C. § 595(b).[8] This report is not filed until *after* all potentially "supervisable" conduct has been completed, and the Division has no power to take any action on the basis of this report, except to determine which portions of it should be made public, subject to appropriate orders "to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution," 28 U.S.C. § 595(b)(3). The Division's receipt of such reports plainly does not thrust it into any "supervisory" role.[9]

[8] Newly enacted § 594(h)(1) also requires independent counsels in the future to file semi-annual expense reports with the Division. These are not substantive reports on the prosecutorial activities of the office, and the Division is in any event given no power to take any action on the basis of them. They thus contribute not a shred of "supervisory" authority to the Division.

Nor do the removal provisions of the statute afford any support to appellees' claim of "supervision" by the Division. In the first place, appellees insist, without offering any explanation, upon ignoring the 1987 amendments to 28 U.S.C. § 596(a)(3), which removed jurisdiction of an action for reinstatement by an independent counsel from the Division and eliminated the "error of fact or law" language upon which they place such heavy reliance. *See* Appellant's Br. 22-23. The Solicitor General, by contrast, has conceded that these amendments, which Congress has declared immediately applicable to sitting independent counsels, govern this case. Sol. Gen. Br. 15. Under the Act as it applies today, the Division

[9] Equally unpersuasive are appellees' assertions that the Division has engaged in "supervision" of the prosecutorial function by "secret[ly] . . . protect[ing] independent counsel from the operation of the criminal laws relating to conflicts of interest," Olson Br. 17-18, or because "a member of the Division has testified before Congress in support of the constitutionality and advisability of Title VI," *id.* at 18. Neither situation complained of involved "supervision" of any aspect of a criminal investigation or any impropriety on the part of the Division members. The Division has recited in appointing orders that independent counsels and their staffs are not special employees of the Department of Justice for purpose of the application of 18 U.S.C. §§ 205 and 207. This provision was a legitimate aspect of defining the nature and scope of the office pursuant to the Division's appointing authority, and became law in the 1987 amendments. *See* Pub. L. No. 100-191, 101 Stat. 1302, to be codified as 28 U.S.C. § 594(i). And the public testimony of Judge MacKinnon before a House Judiciary Subcommittee was consistent with the long-standing practice of Justices of this Court and judges of lower federal courts to give testimony before the Congress on the administration of justice and matters of concern to the federal judiciary.

has *no* role in reviewing a removal decision by the Attorney General.

Likewise, the Division's never-exercised power under 28 U.S.C. § 596(b)(2) to terminate the office of an independent counsel upon a finding that the mission of the office has been substantially completed lends no support to appellees' "supervision" argument, except on the "cynical view," Sol. Gen. Br. 16, that the Division will ignore the limited nature of its function. Section 596(b)(2), unlike § 596(a)(1), is not a general removal provision, and it involves the Division neither in the "supervision" of any aspect of the independent counsel's conduct nor in substantive review of the correctness or propriety of any action taken. The question of "good cause" for removal is exclusively for the Attorney General. The Division is merely empowered to determine that the investigation for which an independent counsel was appointed in the first place has been substantially completed.

II. THE CONSTITUTIONAL FRAMEWORK

Although appellees and the Solicitor General fault Title VI on a variety of grounds, we here restrict ourselves to addressing what seems to us the "meat" of the arguments for affirmance—that, even if neither of the other Branches benefits, the statute impermissibly deprives the President of three purportedly "core" prerogatives: (1) the right himself, or through his subordinates, to appoint all Executive Branch officers; (2) the authority to direct all such officers in the performance of their duties, especially those involving criminal law enforcement; and (3) the power to remove all such officers at will. Concededly, the statute does circumscribe presidential authority in the three ways listed. However, at least in the very limited context presented here, no constitutional violation results.

A. Appointment

The text of the Constitution expressly tells us that the power of appointment is *not*, in all cases, an exclusively presidential prerogative. The Appointments Clause invites the Congress to lodge the selection of "such inferior Officers, as they think proper" in a "Court of Law" or a "Head of Department." Assuming that an independent counsel is an inferior officer whose appointment Congress may provide for under the proviso of the Appointments Clause, the question here is whether appellees are correct that appointments by a court of law must be understood as impliedly confined to court officials.[10]

First, it is not obvious why we should depart from the plain words of the Clause and import such a restriction in the name of separation of powers. After all, the Constitution requires presidential nomination of the Justices of this Court, permits (perhaps requires) the President to appoint other federal judges, and authorizes the President to appoint congressional officers (*e.g.*, the Comptroller General, the Librarian of Congress). Why should we conclude that the Framers would have con-

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[10] Appellees Schmults and Dinkins renew in this Court their argument, rejected by both courts below, that the power of the independent counsel to appoint staff to assist her in the performance of her functions, *see* 28 U.S.C. § 594(c), somehow invalidates the statutory scheme or provides a ground for striking down their contempt judgments. Schmults Br. 35-36. They never explain, however, what impact their complaint, if accepted, should have on the contempt judgments. They fail to point, for example, to *any* action purportedly undertaken by any member of appellant's staff on his or her own authority as an "officer" of the United States, let alone any such action which affected them. Nor do they explain why their argument should be deemed properly before the Court. It was not accepted by either court below, and appellees did not cross-appeal or petition for *certiorari*. Presumably, the point is advanced as an alternative ground for sustaining the judgment of the court of appeals. But it is not clear that reversal of the court below on this question would produce the same judgment. In any event, on the state of this record, at least, appellant's staff are plainly not "officers of the United States," but mere "employees" whose appointments are not subject to the strictures of the Clause. *See Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976); *Auffmordt v. Hedden*, 137 U.S. 310 (1880); *United States v. Germaine*, 99 U.S. 508 (1879).

demned judicial selection of some Executive Branch officers as offensive to the separation of powers principle, while approving cross-branch appointments in the other direction?

Second, it is wholly unsatisfactory to suppose courts of law are expressly mentioned in the Appointments Clause for the sole purpose of authorizing Congress to permit a court to appoint its own clerk and bailiff. Surely, the Framers thought that went without saying—just as Congress may appoint its own officers without explicit constitutional authorization.[11] *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124, 2130-34 (1987). The fact that the proviso was added to the Appointments Clause at the end of the Convention, when further changes were unwelcome, indicates that it was a matter of some importance. Indeed, after its initial rejection by an equally divided vote, the proposal was put a second time on the ground that "some such provision [was] too necessary to be omitted" and was then unanimously adopted. 2 M. Farrand, *The Records of the Federal Convention, 1787*, 627-28 (rev. ed. 1911).

Plainly, the Framers were not concerned with the appointment of court personnel. Every reference indicates that the proviso to the Appointments Clause contemplated officers of the Executive Branch, and it expressly invites Congress to vest some such appointments in the law courts. The contrary notion is nothing less than a return, without textual justification, to the "archaic view of the separation of powers as requiring these airtight

[11] While art. I, §§ 2 and 3 expressly authorize each *House* to appoint its own officers, there is no provision for congressional appointment of officers of the whole *Congress*, such as the Director of the Congressional Budget Office and the Director of the Office of Technology Assessment, who are appointed by designated Members, 2 U.S.C. §§ 474(a), 601(2), and we suppose no one doubts the constitutional propriety of that arrangement, or of a like formula for the other named officers if Congress chose to abandon the current mode of appointment. This must be an exercise of inherent legislative power. *Cf. Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1827).

departments of government." *Nixon v. Administrator of Gen'l Services*, 433 U.S. 425, 443 (1977).

Third, the independent counsel is engaged in a nonpolitical task which does not normally implicate presidential policy. No doubt, the President should be free to choose as his Secretary of State an individual who shares his view of foreign policy and who will follow presidential directives without demur. Similar considerations may be relevant, today at least, in the selection of an Attorney General, whose responsibilities go well beyond enforcing the criminal law. But a prosecuting attorney owes allegiance to the law, not to a political master, and he does not normally receive direction from the President.

This is especially so in the present context, involving only an *ad hoc* prosecutor with an extremely limited mandate. An independent counsel is, moreover, subject to the policy guidelines formulated by the Attorney General, and, unlike other prosecutors, makes no policy and sets no priorities. He exercises only that discretion which is necessarily left to the individual prosecutor.

Finally, it bears repeating that no appointment can occur until and unless the Attorney General determines, in his unreviewable discretion, that an independent counsel is necessary. Neither Congress nor the judiciary can create this office. The potential independent counsel becomes an actuality only if the President's legal officer so decides.

B. Direction

The President's power of directing Executive Branch officers is not a universal axiom enshrined in the Faithful Execution Clause of Article II. Upon first reading, the Clause may appear to be little more than a truism: the task of the Executive is to execute the law. Presumably, however, the point of the provision is not to state the obvious, but—as the words "take Care" and "faithfully" suggest—to stress that the President has no power of

suspending the law enacted by Congress. So understood, the Faithful Execution Clause tells us nothing about the constitutional propriety of legislation that assigns responsibilities within the Executive Branch and, in discrete cases, exempts an executive officer from presidential direction or review.

To be sure, the Framers ultimately endorsed the principle of a unitary executive. This is not, however, a sufficient foundation for the elaborate structure that appellees seek to build upon it. It has always been unreal to posit a President who is legally responsible and politically accountable for every act done within the Executive Branch. Especially is it fanciful to suppose a President held to account by the people for the misdeeds of each of "his" prosecutors in the field. Conceivably, the public might attribute to the President a persistent failure to bring to book political allies guilty of official misfeasance, but, needless to say, that is not the complaint here.[12]

From the beginning, it has been recognized that Congress could allocate particular duties to officers within the Executive Branch and insulate their decisions from presidential review. *See* Appellant's Br. 49-51. The principle is settled that the single President ordained by the Constitution need not be left free to act as absolute ruler within the Executive Branch. The only open question is whether the conduct of criminal prosecutions is so essentially presidential business that Congress can assign no part of the task—however compelling the reason—to an independent officer.

As we have noted, the unique character of a prosecutor's task renders presidential interference abnormal—indeed, normally improper. Undeniably, criminal prosecution is Executive Branch business, but it is not, except in the rarest instance, *presidential* business. Unlike the conduct

[12] It seems obvious that avoiding such a default is more effective than indulging the hope that, after the fact, the electorate will "punish" the President responsible (or his party, if he himself is not standing for re-election).

of foreign affairs and the command of the armed services, the Constitution does not designate the President, personally, as the prime mover in criminal enforcement. In the debates of the National Convention, of the ratifying conventions, and in contemporary comments, including *The Federalist*, we have come across no reference to the Chief Executive controlling the prosecutors. On the contrary, the objections to the pardon power as potentially shielding the guilty confederates of the President suggest that at least some of the Framers thought he could not accomplish the same end merely by directing the government's attorney. *See, e.g.*, 3 M. Farrand, *supra* at 218 (Luther Martin). And, in fact, there appears to be no instance of a direct order to prosecute or not to do so until Attorney General Taney's Opinion of 1831.[13]

Nor is prosecution at the heart of the Faithful Execution Clause. Even today, the law is normally executed by means other than criminal prosecution. See, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 138, 140-41 (1976); *Bowsher v. Synar*, 106 S.Ct. 3181, 3187-93 (1986). This was all the more so in the vision of the Framers, who anticipated very few federal crimes and a very meager, part-time, and decentralized prosecutorial force.[14] There is, indeed, a far better argument for protecting the President's civil enforcement powers from congressional diminution. This much broader arena is, typically, where policy, even politics, has a proper role and, therefore, is the place for presidential supervision. Yet the Court has repeatedly condoned insulating aspects of civil enforcement from presidential control, and has even approved congressional sanction of judicial review of a Cabinet

[13] 2 Op. Atty. Gen. 482 (1831); *see* L. White, *The Federalists* 164-68, 406-11 (1948).

[14] *See* L. White, *supra* at 166, 406; Appellant's Br. 41 n.56, 52-53 & nn. 73, 74. Besides criminal penalty provisions attached to a handful of revenue and commerce laws, the "criminal code" for the first decade under the Constitution enumerated barely twenty crimes, most of them confined to acts committed on the high seas or within federal enclaves. *See* Act of April 30, 1790, ch. 9, 1 Stat. 112.

officer's refusal to bring a civil proceeding. *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

But even if Congress constitutionally might have wholly released the independent counsel from presidential policy, it did not go so far. The fact is that the independent counsel *is* subject to general prosecution guidelines formulated by the Department of Justice—except only where it is impossible to follow them. 28 U.S.C. § 594(f). In this way, the President's legitimate concerns are accommodated and, at the same time, the necessary independence of the independent counsel is attained.

Finally, the entire purpose—and, we submit, the net effect—of Title VI is to *enhance* the fulfillment of the executive's mandate of "faithful execution of the laws" in one limited, but important, category of cases affecting the health of our national government, by removing the prosecutorial function in these highly-charged cases from the maelstrom of partisan politics.

C. Removal

Very little space need be devoted to the complaint that the President's *alter ego* may remove an independent counsel only for cause. The retention of the removal power in the Attorney General safeguards against any self-indulgent frolic by an independent counsel contrary to established Executive Branch policy. Moreover, the so-called "Decision of 1789" settled nothing more than that the Senate's role in the appointment process does not empower it to reserve a similar unconstrained veto over removals. This Court has at all times—specifically including its decision in *Myers v. United States*, 272 U.S. 52, 160-62 (1926)—recognized that Congress may impose restrictions upon the President's power to remove inferior Executive Branch officers. That proposition was established more than a century ago in *United States v. Perkins*, 116 U.S. 483, 485 (1886), and was re-affirmed as recently as *Wiener v. United States*, 357 U.S. 349 (1958). Accordingly, assuming appellant is an inferior officer, the

question is whether there are unique reasons why this general rule should not be applied to an independent counsel.

Notwithstanding some *dicta* in *Humphrey's Executor v. United States*, 295 U.S. 602, 627-28, 631-32 (1935), we submit there are no exceptions.[15] The holding in *Perkins*, sustaining a prohibition on dismissal of military officers in peace time except for cause, strongly suggests that Congress is free to impose like restraints on the removal of *every* inferior executive officer. And the prevailing opinion in *Myers* itself contains no *caveat*. But even if a curb on the President's removal power is impermissible with respect to some Executive Branch officials who make policy, or whose office requires obedience to presidential policy, this is not such a case.

The criminal prosecutor, as we have said, is a servant of the law, not of the President's will, except in the rare case implicating other executive interests. To the extent that there exists a relevant general prosecutorial policy, the independent counsel is subject to it and is removable for inexcusably ignoring it. Thus, the removal provision of Title VI, like the other aspects of the arrangement already considered, trenches on executive prerogatives in no measurable degree.

D. Overall Effect on Presidential Prerogatives

The Solicitor General asserts that no prior decision of this Court condones what he describes as a three-fold incursion on Presidential prerogatives: the powers of appointment, direction and removal. But despite his strenuous effort to distinguish away the seminal ruling in *Ex Parte Siebold*, 100 U.S. 371, 397-398 (1880), we

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[15] It would indeed be ironic if the opinion in *Humphrey's Executor*, which not only upheld a "good cause" limitation on presidential removal power but was at great pains to limit the broad-ranging *dicta* of *Myers* with respect to the scope of executive power, *see* 295 U.S. at 626, were read to expand the constitutional removal prerogatives of the President beyond those asserted in *Myers* itself.

submit that decision controls our case. The Court there rejected a constitutional challenge to election supervisors who were appointed and removable by a court, with no executive supervision in the interim. Moreover, as we read the Solicitor General's brief, he would not bless the statute if it contained only what he saw as one vice or two, instead of three.

At all events, the opponents of Title VI gain nothing by seeking to cumulate the effect of the several features complained of. In truth, the overall consequence for presidential prerogatives is quite minimal when appointment, direction and removal are considered together. As we have noted, the Executive's powers are significantly preserved at each stage and each enhances the other. Thus the Attorney General can refuse to invoke the Act where to do so would conflict with other legitimate executive interests. And the independent counsel's duty to obey Department of Justice policies is reinforced by the Attorney General's authority to remove him if he inexcusably fails to comply. Neither singly nor in combination do the necessary restrictions on presidential control violate the text or spirit of Article II of the Constitution.

III. PRACTICAL CONSEQUENCES

Three purported "practical realities" are invoked against Title VI: (1) the "extraordinary isolation" of independent counsel from the Executive Branch, Levi, Bell, Smith Br. 2; (2) a potential for "significant disruption" of the Executive Branch, *id.*; Sol. Gen. Br. 42; and (3) perceived threats to individual liberty.

A. Isolation

It is argued that federal prosecutors within the Department of Justice are uniquely and exclusively positioned to know, respond to and apply with precision the collective wisdom of centuries under our constitutional system. *But see* Appellant's Br. 21 n.32. The statutory requirement that independent counsels comply with established Department policies and guidelines is dismissed on the ground that the truly important precepts cannot be written down

and are imparted through training and involvement with Department prosecutions over a period of time.

This argument ignores not merely a century of decentralized federal prosecution, *see* Appellant's Br. 52-53, but even the realities of current practice. The overwhelming bulk of federal prosecutions are conducted by the 94 United States Attorney's Offices—all administered by different United States Attorneys with diverse backgrounds and approaches—whose physical distance from departmental headquarters in Washington permits their day-to-day decisionmaking to be informed only by established, written guidelines and policies. The United States Attorneys are free, of course, to seek assistance on questions of policy or discretion if they choose to do so. But so are independent counsels. *See* 28 U.S.C. § 594(d). In either case, the "institutional memory" of the collective career staff of the Department is available only if the prosecutor recognizes the need for such guidance *and* voluntarily takes steps to obtain that information before taking action.[16]

B. Disruption of Executive Branch Policies

Appellees and *amici* argue, first, that decisions made in any given prosecution are fraught with potential for disruption of an overall executive design for development of the federal criminal law, and second, that prosecutorial interests must be weighed against competing executive interests, such as foreign affairs and national security. These concerns are overstated, and neither is ripe for resolution in this case—which involves no such executive conflicts. In any event, there are mechanisms established by the statute through which each can be addressed.

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[16] The charge of appellees and *amici* that independent counsels would not and do not seek departmental guidance pursuant to § 594(a) is supported by neither record evidence nor common sense. For a different view of actual experience under the Act, *see* Seymour Br. 24; Coleman, *The Case for the Independent Counsel*, Wash. Post., Feb. 22, 1988, p. A-11, col. 1.

The vision of irresponsible independent counsels, running roughshod over federal law enforcement concerns and competing executive interests to "get their man" (or woman) is without foundation. The small number of indictments sought by independent counsels to date and the 100 per cent conviction rate thus far are strong evidence to the contrary. The statute in any event provides three significant safeguards.

First, if the Attorney General perceives a threat to federal enforcement policy or competing executive interests arising from a potential prosecution, he can decline to apply for the appointment of an independent counsel. Second, if the issue arises later, the independent counsel may seek guidance under § 594(d), or the Department may communicate its concerns to the independent counsel. Finally, should the problem surface in some legal proceeding conducted by the independent counsel, the Department has the right to appear and be heard by the court considering the issue. 28 U.S.C. § 597(b).

Moreover, this particular goblin—like several others—is not before the Court. No foreign affairs or national security issues have arisen in connection with appellant's investigation, and the possibility of their appearance at some future date in this or some other case does not affect the facial constitutionality of the statute.

C. Threats to Individual Liberty

The expressed concern of the statute's detractors for the preservation of civil liberties have already been addressed. *See* Appellant's Br. 57-60. Two points bear emphasis here. Congress expressly sought—successfully, we submit—to *benefit* targets of independent counsel investigations in two ways: by insulating prosecutorial decision-making from the political pressures weighing upon the Attorney General in favor of prosecution, and by affording the enhanced name-clearing value of a decision not to prosecute reached by one independent of the Administration. More important, the essential safeguards of the Constitution, the Bill of Rights, the statutes and

rules governing criminal proceedings are fully applicable in any prosecution brought by an independent counsel. There is no ground to believe that the Framers looked to the structure of the executive establishment rather than to such traditional procedural safeguards for the protection of the rights of the accused. Indeed, as former Attorney General Griffin Bell has noted, the first Congress and those that followed for 80 years declined to create a centralized Department of Justice and preferred district attorneys "totally independent of the Attorney General" out of fear that "strong central enforcement of laws" by "machinery in the executive branch" might "serve as an engine of oppression." Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 Fordham L. Rev. 1049, 1051 (1978).

One of appellees' *amici* submitted a most apt reflection on the source of evenhandedness and fairness in federal prosecutions.

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[17]

The Executive has no monopoly on discerning these qualities in its appointees.

D. Proposed Alternatives

Appellees and the Solicitor General are at pains to outline what they claim are constitutionally acceptable alternatives for the achievement of Congress' purpose. It goes without saying that the Court's task is not to second-guess legislative choice. The question is whether

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[17] R. H. Jackson, *The Federal Prosecutor* (Address 1940), reprinted in Levi, Bell, Smith Br. App. 1a, 7a.

Congress' chosen means transgress constitutional limitations, not whether some other solution might be found, or even whether other potential schemes might avoid the constitutional issues now before the Court. In any event, none of the proposals put forward is obviously preferable in simultaneously achieving prosecutorial independence and avoiding constitutional questions. Those which would grant appointment power to the President or the Attorney General sacrifice a significant measure of the desired independence, quite unnecessarily, in view of the express provisions of the Appointments Clause. Similarly, expanding the executive's power of removal denigrates the prosecutor's essential independence without improving matters from a constitutional point of view, in light of this Court's unbroken recognition of the propriety of limitations on removal. The real question here is whether prosecutorial decisions in this narrow group of cases can be insulated from political direction by the President—as they must be to achieve the congressional goal. The language and history of the Constitution, as well as the historical realities of law enforcement against high government officials, argue forcefully that this end, achieved by these means, is not merely permissible, but entirely consonant with our scheme of government.

CONCLUSION

It is respectfully submitted that the decision below should be reversed.

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MOTION FILED
APR 18 1988

No. 87-1279

IN THE
Supreme Court of the United States
October Term, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE REPLY BRIEF AND REPLY BRIEF AMICUS CURIAE OF WHITNEY NORTH SEYMOUR, JR., INDEPENDENT COUNSEL, IN SUPPORT OF APPELLANT ALEXIA MORRISON

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MOTION OF WHITNEY NORTH SEYMOUR, JR., FOR LEAVE TO FILE REPLY BRIEF AMICUS CURIAE

Whitney North Seymour, Jr., Independent Counsel, respectfully moves for leave to file the attached reply brief *amicus curiae* in this case.

While we are aware that the Rules of the Supreme Court do not provide for the filing of a reply brief by an amicus, we seek leave to make this brief submission for the following reasons.

First, Michael K. Deaver is the first individual to be indicted, tried and convicted as a result of proceedings conducted by an Independent Counsel appointed pursuant to the statute under review. Despite the conviction, returned in December 1987 following a two-month jury trial, no sentence has been imposed in the case, which has been stayed pending decision

in the instant appeal. The resolution of the issues now before this Court will therefore have a substantial impact on the Deaver case.

Second, it is clear from the briefs of the parties and other amici that several of the issues now before the Court hinge upon an assessment of the actual operations of an independent counsel's office, and the Court of Appeals' view of these matters. Because Independent Counsel Morrison's case has not proceeded beyond the investigative stage, we sought in our earlier submissions to provide the Court with facts and arguments relevant to these operational issues from the perspective of an Independent Counsel's case which had resulted in a contested trial and jury verdict of guilt. Regrettably, this effort appears to have triggered a predictable adversarial response from amicus Deaver, laden with distortion of the trial and pre-trial record, which threatens to discourage reliance by this Court on the experience with the statutory procedure which can be appreciated from reference to the Deaver case. Mindful of the need to avoid unnecessary burdens on this Court, we have therefore prepared this brief response, in the hope that it clarifies these matters.

Respectfully submitted,

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April 18, 1988

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IN THE

Supreme Court of the United States

October Term, 1987

No. 87-1279

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF AMICUS CURIAE OF WHITNEY NORTH SEYMOUR, JR., INDEPENDENT COUNSEL, IN SUPPORT OF APPELLANT ALEXIA MORRISON

In his brief in support of appellees, amicus Deaver seeks to persuade this Court that the investigation and trial in his case "demonstrate the danger to individual citizens of the unaccountable exercise of governmental power outside the structural protections of the constitutional principle of separation of powers." (Deaver Br. 29). In fact, the record of the Deaver case demonstrates the converse of that proposition. A proper understanding of that record puts to rest the imagined fears about the activities of independent counsel conjured up by appellees and their amici. Moreover, such an understanding confirms the wisdom of the congressional judgment of the need for an independent investigative and prosecutive capacity when a conflict of interest arises in the executive branch.

I. THE EFFORT TO SECURE EVIDENCE FROM CANADA WAS ENTIRELY PROPER

Deaver contends that the Independent Counsel's efforts to obtain evidence probative of Deaver's lobbying efforts on behalf of the Government of Canada (and of his perjury about this subject) "provoked an international incident" (Br. 5). The truth is far less sensational.

In fact, the Independent Counsel did nothing that "violat[ed] . . . accepted principles of diplomatic immunity" (Br. 5), but rather merely presented to the court, for judicial resolution, a traditional legal issue: whether Canadian diplomatic immunity had been waived. Although the District Court ultimately ruled that no waiver had taken place, the Court's opinion in no way suggested that the Independent Counsel acted improperly in submitting the matter for judicial resolution. *United States v. Deaver*, Cr. 87-096 (Mem. and Order, June 22, 1987).[1]

Equally off base is Deaver's contention that the Independent Counsel acted improperly in contacting counsel for the Canadian government before trial to determine whether Canada would waive its diplomatic immunity (Br. 5-6). The suggestion seems to be that this episode reveals the

[1]It is noteworthy that when the issue was placed before the District Court below, the trial judge expressly rejected the position advanced by the Departments of State and Justice that a court may not look beyond the State Department's certification of diplomatic immunity to determine whether a witness is subject to compulsory process. (Mem. and Order at 5). It is clear from the trial judge's ruling that the Court regarded the subpoena matter as raising a genuine legal issue suitable for resolution by traditional resort to legal process and judical review.

This fact is also confirmed by recognition that the Deaver investigation involved efforts, through State Department channels, to gain the cooperation of the Korean government as well, but that government absolutely refused to provide any information. There was no basis, therefore, for arguing waiver of diplomatic immunity, and no attempt was made to do so.

undesirability of independent counsel because it shows that an unrestrained prosecutor may "spark[ ] [a] diplomatic crisis. . . ." (*Id.*) The record reveals otherwise.

When this matter was raised in the District Court, the trial judge ruled that Independent Counsel had *not* "done anything unethical, or improper or unlawful." (Tr. Oct. 26, 1987 at 18). Indeed, counsel for the State and Justice Departments conceded in court that, despite the diplomatic considerations involved, it was entirely proper for Independent Counsel to communicate with the Washington, D.C. lawyer retained to represent Canada in the Deaver investigation (*Id.* at 3).

The Court accurately characterized the letter at issue

> as a communication from one lawyer to another as to what would be the likely consequences of an inability to present testimony in one form or another. And most trial lawyers have at one time or another in their careers had to write similar letters to counsel for other parties.

(*Id.* at 8-9). With regard to the claim that Independent Counsel's behavior toward Canada, unrestrained by State or Justice Department influence, interfered with foreign relations by embarrassing the Canadian government, the trial court observed that it had been the decision of the Canadian and United States governments to publicize the private lawyer-to-lawyer communication, and therefore "Canada herself [was] the engine of the embarrassment that she has sustained, if, indeed, she has been embarrassed by the whole exchange." (*Id.* at 8).[2]

[2]One cannot help but harbor the suspicion that the crocodile tears which have been shed over Canadian sensibilities in this matter actually conceal a motive to gather ammunition to use in the battle against the statute under review, even if that requires publicizing matters which sacrifice the genuine concerns of our allies.

In short, nothing in the record supports the proposition that the Independent Counsel acted improperly in pursuing evidence in the possession of the Canadian government, much less that U.S.-Canadian relations were harmed.[3]

Finally, if an independent counsel engaged in such serious misconduct regarding a foreign government as Deaver suggests took place here, the Act provides the Attorney General with a speedy and effective remedy — the independent counsel may be removed "for good cause." 28 U.S.C. § 596(a)(1). The fact that this legislative provision was not even contemplated in the instant case demonstrates conclusively that the specter of an "international incident" was, and remains, imaginary.

2. Deaver Was Not Trapped Into Committing Perjury Concerning TWA

There is no need to respond at length to the canard that the TWA perjury count in the indictment — on which Deaver was convicted of lying to a federal grand jury — was a product of a "perjury trap" (Br. 8 n.4). In pressing this argument Deaver conveys the false impression that the "alleged contact" by Deaver of which the Independent Counsel was apprised had something to do with the TWA-Carl Icahn tender offer, which was the subject matter of Deaver's perjury. Worse yet, Deaver disingenuously fails to inform this Court that the same argument was presented to the District Court (along with the same misrepresentation of fact) and the District Court found it to be absolutely baseless.

Specifically, the trial judge observed,

[3]Significantly, the brief of the United States as *amicus curiae*, submitted by the Solicitor General, makes no claim that the actions of Independent Counsel damaged relations between the United States and Canada.

> Mr. Deaver was a target — in fact, at the time the only target — of Mr. Seymour's grand jury, and had known so from the beginning of the investigation. He appeared voluntarily before the grand jury, had the benefit of counsel close at hand, and had the right, in the circumstances, to refuse to answer any or all questions put to him. He chose to give the answer to the question which now forms the basis for Count Three, as well as others, fully aware that he might not know all that Independent Counsel and the grand jury already knew, and he cannot now complain that their keeping him in ignorance was such fundamental prosecutorial misconduct as to require that the prosecution be abated. Whether the question was unfair, in the sense that Mr. Deaver had not prepared for it, that his recollection was unrefreshed by his interrogator, or that his attention was unfocused on the significance of the answer he gave, are matters for the jury to ponder when it is called upon to determine if his testimony was knowingly false.

(Mem. and Order, June 22, 1987).

The claim of unfair surprise was fully aired before the trial jury, which rejected it in convicting on this count.

3. The Grand Jury's Subpoena Power Was Not Excessively Used

Deaver's assertion (Br. 14) that "Mr. Seymour proceeded to subpoena every document ever generated by Mr. Deaver's firm" is a misleading half-truth. On the day Deaver appeared before the grand jury, he was handed a subpoena nominally covering all of his office files but with an accompany-

ing letter to his counsel explaining that the purpose of the subpoena was to prevent *destruction* or *disappearance* of those documents during the course of the grand jury investigation. Deaver was explicitly told in that letter that he should only produce documents upon specific written request, and a substantial number of his firm's files were never requested or produced. (Letter, Seymour to Miller, June 20, 1986).

When the investigation got underway, Deaver was the first witness to appear before the grand jury. During that voluntary appearance he identified seventeen clients on behalf of whom he and his firm had made contacts with Executive Branch officials (Grand Jury Ex. 4; Gov't Trial Exhibit 36). Thereafter, allegations and evidence of possible violations with respect to fourteen of these clients led to subpoenas or requests for those clients' Deaver-related files. No subpoenas were served requesting files of three of the clients named by Deaver during that grand jury appearance, nor for *any* clients on whose behalf no government contacts were made.

Deaver's own recognition of the legitimacy of the Independent Counsel's inquiry is reflected in the fact that neither he nor any of his clients ever moved to quash a grand jury subpoena at any stage of the investigation, on grounds of overbreadth, hardship, or the like.

These facts cannot support the inference Deaver strains to pull from them, that the limited independence of an investigation conducted by Independent Counsel creates an undue risk of prosecutorial excess.

4. The Supplemental Order Is No Evidence of Undue Judicial Involvement in Prosecutive Decisions

Deaver attempts to construct a cause-and-effect relationship between an alleged "challenge" to the Independent Counsel's jurisdiction and the latter's petition for a supplemental order clarifying the jurisdiction under the original order of appointment. (Br. 14). Deaver's brief appears to refer to letters of transmittal sent with files produced from his office, in which his counsel repeatedly asserted that the inquiry should be limited to two topics. On its face, the order of appointment of May 29, 1986 clearly extended far beyond that "challenge," and the letters were therefore disregarded.[4]

The actual reasons for requesting the supplemental order are stated in the Independent Counsel's petition of December 11, 1986, which is included in the appendix to this brief at page 21a. They had nothing to do with any challenge by Deaver, but anticipated possible challenges by other potential defendants. The petition makes it clear that Independent Counsel was not requesting an *expansion* of his jurisdiction, but rather a *clarification* of what he was authorized and expected to do:

> Although this Court's order of May 29, 1986 appears to include jurisdiction to prosecute such offenses, it would be desirable for the court to clarify its specific intent in order to minimize delays in any possible subsequent prosecutions caused by pro-

[4]Deaver's challenge in the District Court to Independent Counsel's jurisdiction was unsuccessful. In denying Deaver's motion to dismiss a portion of the indictment on jurisdictional grounds, the trial judge ruled that "neither the application nor the order of appointment contemplated that Independent Counsel Seymour's investigative jurisdiction would be confined solely to the instances alleged . . . . the former sought, and the latter authorized an inquiry into Mr. Deaver's post-government service lobbying activities generally;" (Mem. and Order June 22, 1987).

> cedural challenges to the jurisdiction of the Independent Counsel questioning his authority to initiate and conduct such prosecutions. Accordingly, petitioner prays that an order be made and entered providing such clarification. (21-22a)[5]

In sum, by seeking clarification from the Special Division of the scope of its initial order, Independent Counsel was acting with the caution and circumspection which appellees and their amici contend is incompatible with the statutory framework. Once again, they have misread the evidence.

---

[5]Deaver labels the application for the order as "secret" in a vain attempt to make it appear illicit. (Br. 14). That the order was entered *ex parte* is irrelevant; so was the initial order it sought to clarify.

Nor is there any inconsistency between the Special Division's supplemental order and *In re Olson*, 818 F.2d 34 (D.C. Cir. Ind. Couns. Div. 1987). There, Independent Counsel Morrison sought referral from the Court pursuant to 28 U.S.C. § 594(e) of allegations against two former Department of Justice officials. Neither official was within the Independent Counsel's existing prosecutive jurisdiction, and the Justice Department had twice concluded that the allegations did not warrant referral. On that record, the Special Division denied the referral, holding that the statute did not grant it authority to refer allegations to the Independent Counsel when the Attorney General has specifically determined that those allegations should not be pursued.

Merely to state the *Olson* holding is to distinguish it from the Deaver case. The Attorney General had *not* determined that any allegations against Deaver were without merit. And in issuing its supplemental order, the Special Division was *not* responding to a request to refer a new matter to the Independent Counsel for investigation, but to a request to clarify the Independent Counsel's existing power to prosecute.

5. The Referral of a Matter to Independent Counsel by a Congressional Committee is no Evidence of Congressional Aggrandizement

On May 16, 1986, Deaver testified under oath before the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce. The Special Division appointed Independent Counsel, on the Deputy Attorney General's application, on May 29, 1986. On August 12, 1986, in an action impressive for its bipartisan nature, the Subcommittee's members unanimously concluded "that Deaver may have committed perjury and made false statements before the Subcommittee in violation of sections 1621 and 1001 of Title 18, U.S.C. and thereby obstructed a Congressional investigation in violation of section 1505." (Letter from Rep. John D. Dingell to Whitney N. Seymour, Jr., August 12, 1986). Accordingly, the Subcommittee unanimously directed its Chairman, Rep. Dingell, to refer "for [Independent Counsel's] consideration information" relevant to the possible commission of those crimes.

According to Deaver, this action alone demonstrates that Congress "directed the course of Mr. Seymour's investigation and prosecution," in a way which amounts to unconstitutional legislative aggrandizement. (Br. 18). The claim is simply preposterous, on both the facts and the law. There was *no* congressional involvement in the direction of the investigation and prosecution. The relationship between Independent Counsel and the House Subcommittee was that of a prosecutor and a source of evidence. Most significantly, none of the specific perjury referrals from the congressional committee formed the specific basis for the charge on which Deaver was ultimately convicted. Three allegations were referred. One was included in Count Two (along with other specifications developed independently by the Independent Counsel's in-

vestigation), but Deaver was acquitted on that count. The two other congressional referrals were rejected by the Independent Counsel as not warranting prosecution.

Moreover, there is nothing new about a special prosecutor being responsible for the handling of a perjury case based on congressional testimony. *See, e.g., United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976); *United States v. Chapin*, 515 F.2d 1274 (D.C. Cir. 1975); *United States v. Reinecke*, 524 F.2d 435 (D.C. Cir. 1975). On Deaver's theory, apparently all such prosecutions, as well as similar prosecutions conducted by the Justice Department, *e.g., United States v. LaVelle*, 751 F.2d 1266 (D.C. Cir. 1985) are incompatible with the principle of separated powers, simply by virtue of congressional notification, and release of transcripts of testimony, to the relevant prosecutor.[6]

6. The Statute Does Not Interfere With Executive Branch Control Over Prosecutive Decision-Making

Deaver's response to the argument in our main brief concerning the relationship between the Attorney General's decision to invoke the independent counsel statute, and the Independent Counsel's decision to prosecute, distorts the actual nature of these two decision processes by simultaneous-

[6]The claim also fails because of its transparent, and unsuccessful, attempt to equate the limited congressional involvement entailed in the referral of an allegation with the examples of legislative encroachment on coordinate branch functions recently disapproved by this Court. *E.g., Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976). It is clear, however, that the independent counsel statute does not contain the deficiencies of the statutes reviewed in those decisions, for Congress does not exceed its constitutional role by referring information to the prosecutor appointed, pursuant to Justice Department application, to investigate the subject matter.

ly underestimating the breadth of the first decision, and overestimating the scope of the second. (Br. 7-9).

First, Deaver unfairly minimizes the decision to invoke the independent counsel mechanism, which is committed to the unreviewable discretion of the Attorney General or his designate. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (*en banc*); *Nathan v. Smith*, 737 F.2d 1069, 1077-82 (D.C. Cir. 1984) (Bork, J., concurring). Contrary to Deaver's suggestion that this decision must be regarded as merely a preliminary finding that further investigation or prosecution is warranted, 28 U.S.C. § 592(c)(1), the decision to apply for appointment of Independent Counsel in the Deaver case was a transfer of "investigative and prosecutive authority"[7] from the Justice Department to Independent Counsel. The Deputy Attorney General's application recommended that the Special Division confer "investigative and prosecutive authority" over certain specific allegations, as well as "investigative and prosecutive authority" over certain other allegations, and "over any related matters developed in the course of the independent counsel's investigation."[8] (App. 6a).

This decision was not dictated by a statute which unconstitutionally deprived the Attorney General of his discretionary decision-making power. On the contrary, the 1982 amendments to the independent counsel statute make clear that Con-

[7]*See* Application Pursuant to 28 U.S.C. § 592(c)(1) for the Appointment of an Independent Counsel to Investigate Michael K. Deaver, included in the appendix to this brief, at pp. 1-6a.

[8]The plain language of this application, which was repeated in the Special Division's order, disposes of Deaver's suggestion that Independent Counsel was not empowered to prosecute Deaver for perjury committed after the date of the application. (Br. 8). Perjury before the grand jury must be the quintessential example of a "related matter developed in the course" of the investigation.

gress expected the Attorney General's determination of whether further investigation or prosecution is warranted to be influenced by the "legitimate exercise of discretion and the [Justice] Department's established policies of law enforcement." S. Rep. No. 496, 97th Cong., 2d Sess. 14 (1982).

Viewed against this backdrop, the initial decision to apply for appointment of independent counsel is fully within the control of the Executive branch, and constitutes a policy decision over the use of the power to enforce the criminal law which the independent counsel is not free to disregard. Accordingly, the range of discretionary decision-making available to independent counsel is somewhat restricted, a point which we stress in our main brief, but which Deaver has construed as an argument that independent counsel is *required* to prosecute in all cases. Thus, Deaver twists this argument into a claim that Independent Counsel regards his role as one in which prosecution must be brought "so long as there are any facts concerning any matter that will support any theory of prosecution," and that Independent Counsel is free to disregard the Justice Department guidelines. (*Id.*) This is neither the point made in our main brief nor the experience in the Deaver case.

As Deaver well knows, the Independent Counsel in his own case chose to go forward on a much more limited theory of criminal liability than was at least theoretically possible. Moreover, in the Deaver case, the Justice Department guidelines on prosecutorial decision-making were utilized. (Main Brief of Independent Counsel Seymour at 15, n.13).

7. The Special Employee Status Order Is No Evidence of Judicial Usurpation of Non-Judicial Authority

Tracking the majority opinion of the Court of Appeals, Deaver attempts to build a constitutional mountain out of the administrative molehill of the Special Division order of July 2, 1986, which designated the Independent Counsel and a number of his assistants as "special employees" and re-affirmed their statutory independence from the Department of Justice. The majority opinion condemns this order (and the parallel order applying to Independent Counsel Morrison) as an *ex parte* proceeding (Slip Op. p.80-81); the Deaver brief calls it a "stunning usurpation of non-judicial authority" (Br. 13). The reality is much simpler than both of these fanciful characterizations.

We have included in the Appendix (at 7-18a) both the Special Division's order and the correspondence from the Office of Government Ethics which generated it (Martin to Seymour, June 5, 1986). These documents indicate that the order was originally proposed by that agency — *not* by the Special Division, and *not* by the Independent Counsel. This is what OGE advised the then recently appointed Independent Counsel:

> Pursuant to yesterday's conversation, I am recommending that you apply to the D.C. Circuit Court of Appeals to amend its order to designate your appointment as one that, in its best estimate, includes duties which will require you to serve for a period not to exceed 130 days within the 365 days following your appointment as Independent Counsel. The foregoing comports with the definition of a special Government employee as contained in Title 18 U.S.C. § 202. A prospective determination by the court that the duties of your office will not exceed

> 130 days within a 365 day period following your appointment will be determinative of your status regardless of how many days during that period you actually work. Such a determination has been reflected in past Orders appointing Independent Counsels. (10a)

The letter went on to volunteer two opinion letters concerning prior appointees (12-18a) which expressed the view that an independent counsel and his or her assistants were deemed to be employees of the Department of Justice for conflict-of-interest purposes. This opinion was not only inconsistent with the plain language of the statute, but also contrary to the actual nature of the working relationship in the offices of independent counsel.

This presented a dilemma: the candidates being recruited for the Deaver investigation were almost all former Assistant U.S. Attorneys from New York. All were recruited for short-term part-time work, to be fitted in alongside their other professional obligations. Most had some involvement in the representation of private clients before local U.S. Attorneys' offices around the country. If their agreement to perform this public service (at a nominal per diem compensation) would mean they or their firms would be disqualified from continuing their present representations, they would be barred from working on the matter. Equally important, under the OGE interpretation, they potentially could face future motions from U.S. Attorneys' offices seeking to disqualify them from wholly unrelated cases. Oral assurances, therefore, were not enough. They needed some protection in writing in case the question should be raised in the future with respect to their firms and their clients.

Independent Counsel Seymour and Morrison conferred,

found they both had the same problem[9] and decided to seek clarification from the appointing authority. OGE was informed and stated it had no objection to the application, which was then made jointly. The Chief Judge was fully informed about the issue and was provided with the OGE letter and enclosures (which he read in the presence of both counsel). Thereafter the orders were issued. The suggestion that there was something untoward about the procedure is totally unwarranted. Moreover, the effort to use this episode as "proof" that the statute entangles the judiciary in the prosecutive process is simply extreme.[10]

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[9]A problem also inherent in accepting a dual appointment by the Attorney General, since that carries with it employment status in the Justice Department.

[10]We relegate to a footnote our response to the frivolous argument (Br. 23-24), which Deaver made on five separate occasions in the District Court, that Independent Counsel came into the investigation of Deaver's conduct with a pre-existing animus toward him, arising out of a prior dispute over "dirty tricks" by the Conservative Party of the State of New York in a U.S. Senate primary campaign. The record before the District Court clearly shows that Deaver himself had no connection with that matter; that the PAC itself had no direct participation; that his earlier affiliation with the PAC that was tangentially involved had long since ended and that in any event Seymour had no knowledge whatsoever of Deaver's tenuous past identification with the organization. In short, the entire issue was totally irrelevant, and factually unfounded. (The most succinct summary of the facts appears in the Independent Counsel's response dated October 20, 1987, filed in the District Court.)

Deaver's suggestion that the Senate should have an "advice and consent" participation in the selection of Independent Counsel disregards the practical fact that the current statutory scheme involves a thorough vetting process. As the Independent Counsel advised the District Court in response to one of the many *ad hominem* defense motions attacking the prosecution:

> We represent to this Court emphatically that to our knowledge the avoidance of conflict of interest was a *major concern* of the Special Division in its search for Independent Counsel. Attorney Seymour was personally interrogated as to potential

CONCLUSION

The independent counsel statute was enacted upon a congressional determination of the need to create a capacity for independent investigation and prosecution in those limited circumstances where the Department of Justice is disabled from going forward because of a conflict of interest. The attack on the statute by appellees and their amici aims to establish that the limited independence from executive branch control violates the structure of our national government, and necessarily endangers individual liberty. The Deaver case is a source of relevant information with regard to this dispute. An appreciation of the workings of the statute in the Deaver case confirms the wisdom of the legislative judgment reflected in the statute, and underscores the need for independence in the investigation and prosecution of wrongdoing by the class of persons covered by the statute. The Deaver record refutes the argument that the statute endangers individual liberties

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conflicts by two of the members of the panel separately, and then jointly by all three members of the panel, prior to his selection. He, in turn, made similar inquiry of every potential assistant prior to appointment to assist in the investigation.

The Independent Counsel and every Associate Independent Counsel was subjected to an FBI field investigation, reviewed by the Security Staff of the Department of Justice. In addition, the Independent Counsel and each attorney who works the requisite number of days, is also required to file Executive Personnel Financial Disclosure Reports issued by the Office of Personnel Management in accordance with the statutory requirements of the Ethics in Government Act, which specifically require disclosure of interests which might create a conflict of interest. (Independent Counsel's Response to Deaver Motion for Inquiry "As to any Conflicts of Interest," p.3)

The effort to find a constitutional defect in the independent counsel statute through this argument reveals nothing so much as the desperation of the statute's opponents.

by authorizing the exercise of unrestrained prosecutorial power.

Respectfully submitted,

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April 18, 1988

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

APPLICATION PURSUANT TO	)	
28 U.S.C. §592(c)(1) FOR THE	)	
APPOINTMENT OF AN INDEPENDENT	)	No. ____
COUNSEL TO INVESTIGATE	)	
MICHAEL K. DEAVER	)	

Pursuant to section 592(c)(1) of Title 28, United States Code, the Deputy Attorney General of the United States[1] hereby makes the following application to the Court for the appointment of an independent counsel with regard to allegations against former Chief of Staff and Assistant to the President Michael K. Deaver.[2]

I. THE ALLEGATIONS

In the early spring of 1986, various allegations concerning Mr. Deaver's lobbying business and possible resulting conflicts of interest began to appear in the press and elsewhere. The primary focus of the news stories was on Mr. Deaver's representation of foreign governments, particularly Canada in

[1]The Attorney General has recused himself and has designated the Deputy Attorney General to act in his stead for purposes of handling this matter.

[2]Mr. Deaver is covered by the independent counsel provisions of the Ethics in Government Act by virtue of his former position. 28 U.S.C.§§ 591(b)(3), (b)(6).

the course of its acid rain negotiations with the United States. On April 23, 1986, a majority of the nonmajority party members of the Committee on the Judiciary of the United States Senate, acting pursuant to 28 U.S.C. §595(e), sent a letter to the Attorney General alleging that various media reports suggested that Mr. Deaver had violated 18 U.S.C. §207, and requesting that the Attorney General determine whether or not to apply for the appointment of an independent counsel.[3]

On April 25, 1986, the Director of the Office of Government Ethics sent a letter to the Attorney General, pursuant to 28 U.S.C. §535, opining that several post federal employment activities of Mr. Deaver may have violated 18 U.S.C. §207.[4] On May 12, 1986, the General Counsel of the General Accounting Office sent a letter to the Criminal Division of the Department of Justice, opining that there existed evidence suggesting that Mr. Deaver violated 18 U.S.C. §207.[5]

After study of the allegations and the results of a factual inquiry into those allegations, the Deputy Attorney General determined that there was sufficient information to warrant applying for the appointment of an independent counsel to examine the following allegations against Mr. Deaver:

1. whether Michael K. Deaver, with the intent to influence, communicated with Robert C. McFarlane in July or August 1985, in connection with a proposal involving section 936 of the Internal Revenue Code, a particular matter pending before, and of direct and substantial interest to, the White House Office (a possible violation of 18 U.S.C §207(c));

[3]A copy of the letter is attached as Exhibit A. [Exhibit omitted]

[4]A copy each of the letter and its enclosures is attached as Exhibit B. [Exhibit omitted]

[5]A copy each of the letter and its enclosures is attached as Exhibit C. [Exhibit omitted]

2. whether Michael K. Deaver acted as a representative for the Government of Canada in an appearance October 25, 1985, before Drew Lewis, Special Envoy for the United States, in connection with a controversy between the United States and Canada about what action the United States should take in response to Canada's urging that the United States take action to eliminate or reduce acid rain (a possible violation of 18 U.S.C. §207(a)); and

3. whether Michael K. Deaver aided and assisted Canadian officials by attending the October 25, 1986, meeting (a possible violation of 18 U.S.C. §207(b)(ii)).

II. DISCUSSION OF THE ALLEGATIONS

A. Representation of the Commonwealth of Puerto Rico

Under the provisions of 18 U.S.C. §207(c), Mr. Deaver was prohibited, for one year following his resignation from federal service, from acting as a representative for anyone (except the United States) in a formal or informal appearance before the White House Office (or any of that office's officials), the office in which he served when he was Deputy Chief of Staff and Assistant to the President, in connection with any particular matter pending before the White House Office or in which that Office had a direct and substantial interest. In addition, Mr. Deaver was prohibited from making any oral or written communication to the White House Office or any of its officials, with the intent to influence, in connecton with such a particular matter.

The results of our inquiry suggest that in July or August 1985, within the year following Mr. Deaver's resignation, he telephoned Robert C. McFarlane, an official of the White

House Office at the time, identified himself as a representative of the Commonwealth of Puerto Rico, then proceeded to present to Mr. McFarlane the views of the Commonwealth of Puerto Rico about a proposal for revocation of a provision of the Internal Revenue Code of substantial interest to the Commonwealth of Puerto Rico. The results of our inquiry furthermore suggest that when Mr. McFarlane received Mr. Deaver's telephone call, Mr. McFarlane, as an official of the White House Office, was a member of a group of executive branch officials having the responsibility of examining whether or not the provision should be revoked. Whether this conduct was in violation of 18 U.S.C. §207(c) warrants further investigation.

B. Representation of the Government of Canada

Following his resignation, under the provisions of 18 U.S.C. §207(a), Mr. Deaver was prohibited for the life of a particular matter involving a specific party or specific parties from acting as a representative for anyone (except the United States) in an informal or formal appearance before any federal agency (except Congress) or official, if he participated personally and substantially in the same particular matter in his capacity as a federal official, and if the United States was a party to or had a direct and substantial interest in the particular matter. In addition, Mr. Deaver was prohibited from making any oral or written communications, with the intent to influence, to any federal agency (except Congress) or official with respect to such a particular matter involving a specific party.

Under the provisions of 18 U.S.C. §207(b)(ii), Mr. Deaver was prohibited for two years following his resignation from aiding or assisting in representing anyone (except the United States) by his personal presence at any informal or formal appearance before a federal agency (except Congress) or official,

in connection with a particular matter involving a specific party or parties in which the United States was a party or had a direct and substantial interest, and in which he participated personally and substantially as a federal official.

The results of our inquiry suggest that in the period of February through mid-March 1985, in the course of a controversy between the United States and Canada about what action the United States should take in response to Canada's urgings that the United States take action to eliminate or reduce acid rain, Mr. Deaver made recommendations, gave advice and otherwise participated substantially in the controversy. The results of our inquiry further suggest that following Mr. Deaver's resignation (May 10, 1985), on October 25, 1985, an important meeting relating to the controversy was in New York City. Mr. Deaver attended the meeting as a consultant to Canadian officials, including the Canadian Ambassador to the United States. A senior official for the United States, its Special Envoy for acid rain attended the meeting. The results of our inquiry suggest that in the course of the meeting, Mr. Deaver spoke out in the meeting, as Canada's consultant, and recommended a solution to a procedural dispute which had arisen in the course of the meeting. Whether this conduct was in violation of 18 U.S.C. §207(a) or §207(b)(ii) warrants further investigation.

III. REQUEST FOR THE APPOINTMENT OF AN INDEPENDENT COUNSEL

Mr. Deaver's post-federal employment representation of the Commonwealth of Puerto Rico and the Government of Canada could constitute a number of offenses under 18 U.S.C. §207. Appointment of an independent counsel is requested to pursue the question whether such representation violated 18 U.S.C. §207 or any other provision of federal criminal law.

IV. PROPOSED JURISDICTION OF THE INDEPENDENT COUNSEL

It is recommended that the independent counsel's jurisdiction include investigative and prosecutive authority over the specific allegations described in Part II above. In addition, it is recommended that the independent counsel's jurisdiction include investigative and prosecutive authority over all other allegations presented in the three referrals, and over any related matters developed in the course of the independent counsel's investigation.

Respectfully submitted,

/s/ D. Lowell Jensen
D. LOWELL JENSEN
Deputy Attorney General
of the United States

Dated: May 22, 1986

FILED MAY 29, 1986

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In Re: Michael K. Deaver — Division No. 86-2

Order Appointing
Independent Counsel

Before: MacKinnon, Presiding, Morgan and Mansfield,
Senior Circuit Judges

Upon consideration of the application of the Deputy Attorney General pursuant to 28 U.S.C. § 592(c)(1) for the appointment of an Independent Counsel with authority to investigate and, if warranted, to prosecute allegations that the conduct of former Chief of Staff and Assistant to the President Michael K. Deaver concerning Mr. Deaver's lobbying business and possible resulting conflicts of interest, including *inter alia* Mr. Deaver's alleged representation of foreign governments, particularly Canada in the course of its acid rain negotiations with the United States, and any related matters developed in the course of the investigation, violated 18 U.S.C. § 207, or any other provision of federal criminal law; it is hereby

ORDERED, by the Court, that Whitney North Seymour, Jr., Esquire of the New York bar, with offices at 100 Park Avenue, New York, New York be and he is hereby appointed Independent Counsel to investigate and pursue the following questions:

1. whether Michael K. Deaver, with the intent to influence, communicated with Robert C. McFarlane in July or August 1985, in connection with a proposal in-

volving section 936 of the Internal Revenue Code, a particular matter pending before, and of direct and substantial interest to, the White House Office (a possible violation of 18 U.S.C. § 207(c));

2. whether Michael K. Deaver acted as a representative for the Government of Canada in an appearance October 25, 1985, before Drew Lewis, Special Envoy for the United States, in connection with a controversy between the United States and Canada about what action the United States should take in response to Canada's urging that the United States take action to eliminate or reduce acid rain (a possible violation of 18 U.S.C. § 207(a)); and

3. whether Michael K. Deaver aided and assisted Canadian officials by attending the October 25, 1986, meeting (a possible violation of 18 U.S.C. § 207(b)(ii)); and

4. whether any allegations presented in the above three referrals, or Mr. Deaver's post-federal employment representation of the Commonwealth of Puerto Rico and the Government of Canada, or any related matters developed in the course of the Independent Counsel's investigation violated 18 U.S.C. § 207, or any other provision of federal law; and it is further

ORDERED, by the Court, that the Independent Counsel shall have jurisdiction to investigate any related matters and other allegations or evidence of violation of any Federal criminal law by Michael K. Deaver developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation, and the Independent Counsel shall have jurisdiction to prosecute for any such violation.

The Independent Counsel shall have all the powers and authority provided by the Ethics in Government Act of 1978, as amended, and specifically by 28 U.S.C. § 594 (copy attached).

[Statute omitted]

Per Curiam
For the Court

/s/ George A. Fisher/rb
George A. Fisher
Clerk

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

Jun 5 1986

Whitney North Seymour, Jr.
100 Park Avenue
New York, NY 10017

Dear Mr. Seymour:

Pursuant to yesterday's conversation, I am recommending that you apply to the D.C. Circuit Court of Appeals to amend its order to designate your appointment as one that, in its best estimate, includes duties which will require you to serve for a period not to exceed 130 days within the 365 days following your appointment as Independent Counsel. The foregoing comports with the definition of a special Government employee as contained in Title 18 U.S.C. §202. A prospective determination by the court that the duties of your office will not exceed 130 days within a 365 day period following your appointment will be determinative of your status regardless of how many days during that period you actually work. Such a determination has been reflected in past Orders appointing Independent Counsels.

Enclosed for your review and consideration are copies of this Office's informal letter opinions 84x4 dated 04/09/84 and 84x13 dated 06/15/84 which sets forth the application of the criminal conflicts of interest statutes to you and members of your staff once your and their special Government employee status has been confirmed. It should be noted that in the past, special Government employee status has been conferred upon Assistant Independent Counsels by court order. However, it

is my opinion that pursuant to Title 28 U.S.C. §594(c) such determinations should be made by you as their appointing authority.

If you serve as Independent Counsel more than 60 days, you will be required to file a public financial disclosure report, an SF 278.

Congratulations on your appointment. I am confident that you will carry out your duties in an exemplary fashion. My Office stands ready to assist you in any way that it can.

Sincerely,

/s/ David H. Martin
David H. Martin
Director

Enclosures

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

84 x 4

Letter to a Private Attorney dated 04/9/84

This letter refers to our meeting of April 6, 198′ and your subsequent correspondence of the same date.

Your letter, as well as our discussion, addressed the question whether your appointment as Independent Counsel pursuant to Title 28 U.S.C. §593 might follow the form of an order entered by the United States Court of Appeals for the District of Columbia Circuit on February 12, 1982 at the request of Leon Silverman, Esq. You provided a copy of that order for our review.

Further, you sought our explanation of the supplementation of salary prohibition of Title 18 U.S.C. §209. You also asked whether a special Government employee is forbidden to represent a client in a criminal case.

We have again reviewed the specimen order, and we reiterate that it is our position that the order would be proper to follow in obtaining special Government status pursuant to Title 18 U.S.C. .§202.

Under the federal conflict of interest laws, the term "special Government employee" is defined as a person who is retained, designated, appointed, or employed, either with or without compensation, to perform temporary duties for not to exceed 130 days out of any period of 365 consecutive days: Title 18 U.S.C. §202(a). A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday, or holiday on which duty is to be performed should be

counted equally with a regular day. Even if it becomes apparent, prior to the end of the 365 days that you have not been accurately classified, you will nevertheless continue to be considered a special Government employee for the remainder of that 365-day period. A new estimate should be made at the expiration of each 365 days thereafter. *Federal Personnel Manual*, 735-C-02.

Pursuant to Title 18 U.S.C. §209(a), it is unlawful for a federal officer or employee to receive any salary, or any contribution to or supplementation of salary, from a private source as compensation for his services to the Federal Government. However, this prohibition does not apply to a special Government employee who serves with or without compensation, Title 18 U.S.C. §209(c). Therefore, as a special Government employee, you or a member of your staff appointed pursuant to 28 U.S.C. §594(c) may continue to be compensated by your law firm even during the time that you are performing services for the Federal Government. However, as explained, there will be an independent restriction on your sharing in compensation received by the law firm in matters pending before the Department of Justice.

The restrictions on your outside activities in matters involving the United States are contained in Title 18 U.S.C. §203 and 205. The former prohibits a person from receiving, agreeing to receive, or soliciting compensation for services rendered by himself or another before a federal department or agency at the time he is an officer or employee of the United States. Section 205 prohibits an officer or employee from acting as agent or attorney for anyone before a federal agency or in court in a matter in which the United States is a party or has a direct and substantial interest and from receiving any gratuity or interest in a claim in consideration of his assistance in the prosecution of a claim against the United States. However, §203

and 205 both have a more limited application to special Government employees.

A special Government employee is subject to §203 and 205 only in relation to a particular matter involving a specific party or parties (1) in which he, at any time, participated personally and substantially while in Government or (2) which is pending in the department in which he is serving. Moreover, the latter prohibition applies only to a special Government employee who has served in the department for more than 60 of the preceding 365 days. You have not served in the Department of Justice during the last year. Therefore, the prohibition against your acting as agent or attorney in matters pending in the Department of Justice and receiving compensation for services rendered before a federal department in relation to such matters will not go into effect until you have actually performed services as Independent Counsel on all or part of 60 of the next 365 days. Until that time, you could personally represent clients in matters pending before the Justice Department, and you could share in your law firm's fees for its services performed in matters before the Department.

If you should perform duties as Independent Counsel on all or part of 60 days, however, you would be barred from personally representing a client in a matter "pending in" the Justice Department, and your firm would have to take measures to ensure that any compensation you might continue to receive from the firm was not attributable to services the firm performed in relation to matters pending in the Justice Department and was not compensation for any advice or assistance you might render to your partners or associates who were prosecuting claims pending in the Department.

A case or other matter is not regarded as pending in the Department for purposes of these restrictions if it is within

the jurisdiction of a court. Thus, if an information or indictment has been filed in a criminal case or a complaint has been filed in a civil case, the matter is no longer pending in the Justice Department. Even after expiration of the 60-day period mentioned above, then, you could personally represent a client in court or before the Department in such criminal cases, and your partnership draw could include fees for these cases. The prohibitions mentioned above would only apply to a grand jury or other investigations or discussions with the Justice Department prior to the filing of an information or indictment in a criminal case and to administrative and civil matters pending in the Department prior to the filing of a law suit.

Please feel free to contact me if you wish to further discuss these matters.

Sincerely,

David H. Martin
Director

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

84 x 13

Letter to a Private Attorney dated 06/15/84

On June 4, 1984, this Office received your letter dated May 9, 1984 requesting that we confirm your understanding of the application of the criminal conflict of interest statutes to [an attorney associated with your firm. The attorney] has been appointed by the Independent Counsel appointed to investigate certain allegations relating to [a specific individual] to serve as an assistance Independent Counsel. During this same time, [the attorney] will continue to serve in an of counsel capacity to your law firm.

It is the position of this Office that the services provided by [the attorney] under his appointment as an assistant Independent Counsel pursuant to the authority in 28 U.S.C. § 594(c) are services provided to the Department of Justice for purposes of the conflict of interest statutes. [See 84 x 4] For purposes of this response, we are assuming that [the attorney] was appointed as a special government employee as that term is defined in 18 U.S.C. § 202. Therefore, the provisions within the criminal conflict of interest statutes that limit the application of those statutes for special government employees to matters which are "pending in" the department or agency which the individual is serving will apply in [the attorney's] case to matters "pending in" the Department of Justice. Moreover, you are correct that [the attorney] does not qualify for the even more limited restrictions of 18 U.S.C. §§ 203 and 205 for special government employees who have served no more than 60 days in their department or agency during the immediately preceding 365 day period. His service

as a full time employee of the [Department] during any portion of that preceding 365 day period must be counted for purposes of determining whether he has served more than 60 days during that period.

Your understanding of this Office's interpretation of when a matter is considered to be "pending in" the Department of Justice is also correct. [The attorney] is prohibited by Section 205 from representing any person to the Department on such matters and is prohibited by Section 203 from receiving any compensation for representational services rendered by anyone else on these matters. With regard to your statement that you believe he is free to consult with other lawyers in your firm on these matters, you are correct that such consultations are not prohibited by Section 205. Before engaging in any such consultations, however, [the attorney] may wish to review the standards of conduct applicable to special government employees of the Department of Justice and all applicable rules of professional conduct for any additional restrictions which may apply.

For purposes of your Section 203 analysis, while you state [the attorney] does not share in the profits of the firm and is compensated on a fixed salary basis by your firm, if at the end of the firm's fiscal year it determines that it will give bonuses to associates or persons serving in of counsel positions, [the a orney's] bonus may not be calculated on any amount that includes fees generated by the firm's representation of clients on matters "pending in" the Department of Justice while he served as a special government employee of the Department. A bonus based in any part on these fees would be prohibited by that section in the same manner as a partnership distribution.

While the supplementation of a government employee's salary by a source other than the Federal government is pro-

hibited by 18 U.S.C. § 209, subsection (c) of that section specifically exempts special government employees from this prohibition. Therefore, there is no criminal conflict of interest provision which will prohibit you from supplementing [the attorney's] Federal compensation in order that he will not, by acting as an assistant Independent Counsel, receive less total compensation during that same time than the firm, prior to his appointment, had agreed to pay him for his of counsel services.

Finally, you are correct in your interpretation of the extent of restrictions of 18 U.S.C. §§ 207(a) and (b)(i) as they are applicable to [the attorney] once he terminates his position with the Department. We do not believe that his position as assistant Independent Counsel is one which is automatically a "senior employee" position pursuant to 18 U.S.C. § 207(d)(1)(A) and, given the level of position indicated by the daily rate of pay stated on his appointment, that position is not eligible to be designated as such by this Office under Section 207(d)(1)(C). Therefore, it is our opinion that [the attorney] will not be subject to the restrictions of Sections 207(b)(ii) and (c) upon leaving his position of assistant Independent Counsel.

If this letter raises further questions, please feel free to contact this Office.

Sincerely,

David H. Martin
Director

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, as Amended

In re: Michael K. Deaver — Division No. 86-2

Designation of
Special Government
Employees

Before: MacKinnon, Presiding, Morgan and Mansfield,
Senior Circuit Judges

ORDER

By order of this Court entered May 29, 1986, Whitney North Seymour, Jr. was appointed Independent Counsel in this matter to perform the duties described in that order, with the powers and authority provided by 28 U.S.C. § 594.

Mr. Seymour has informed the Court that, as provided in 28 U.S.C. § 594(c), he has appointed DAVID BRODSKY, ANDREW JOSHUA LEVANDER, JOHN W. NIELDS, JR., NICHOLAS SCOPPETTA, and PAUL SHECHMAN to assist him in carrying out the duties of Independent Counsel.

Mr. Seymour has further informed the Court that his best estimate of time required for him and each of his assistants to carry out their duties will not exceed 130 days within the 365 days following his appointment as Independent Counsel and that their work will be carried out in complete independence and separation from the United States Department of Justice.

In consideration of the foregoing, the Court concludes that the time estimate, and representation regarding independence from the Department of Justice, are reasonable, and accordingly, it is hereby

ORDERED, pursuant to 18 U.S.C. § 202, that WHITNEY NORTH SEYMOUR, JR., DAVID BRODSKY, ANDREW JOSHUA LEVANDER, JOHN W. NIELDS, JR., NICHOLAS SCOPPETTA and PAUL SHECHMAN, are designated and classified as Special Government Employees of the Office of Independent Counsel as a separate special agency for the limited purposes described in the Court's Order of May 29, 1986, and for no other purpose, and in connection with this cause are not to be considered employees of, or subject to the supervision or control of the United States Department of Justice for any purpose, including the provisions of 18 U.S.C. § 203(c) or § 205; and it is further

ORDERED, that this Order be filed with the Clerk of the Court and maintained under seal, subject to the further order of the Court.

Per Curiam
For the Court:

_____

George A. Fisher
Clerk

FILED JUL 2 1986
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Division for the Purpose of Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In Re: Michael K. Deaver Division No. 86-2

PETITION OF WHITNEY NORTH SEYMOUR, JR.

Whitney North Seymour, Jr., respectfully petitions the Court for the issuance of a Supplemental Order clarifying the Independent Counsel's jurisdiction to prosecute violations of the Federal criminal law pursuant to the Court's order of May 29, 1986.

It has come to the Independent Counsel's attention during the course of his investigation that certain persons and entities may have conspired with and aided and abetted Michael K. Deaver in violating 18 U.S.C. Section 207; that certain officers and employees of Michael K. Deaver and Associates, Inc., of which Mr. Deaver is founder and principal stockholder, may have violated 18 U.S.C. Section 207; and that various persons may have obstructed justice, given false testimony or made false statements during the course of the Independent Counsel's investigation and the preliminary investigations leading up to his appointment.

In addition, the Subcommittee on Oversight and Investigation of the Committee on Energy and Commerce of the House of Representatives has requested the Independent Counsel to investigate Mr. Deaver's testimony before that committee on May 16, 1986, and to prosecute Mr. Deaver for any false testimony given before the Subcommittee on that date.

Although this Court's order of May 29, 1986 appears to include jurisdiction to prosecute such offenses, it would be

desirable for the Court to clarify its specific intent in order to minimize delays in any possible subsequent prosecutions caused by procedural challenges to the jurisdiction of the Independent Counsel questioning his authority to initiate and conduct such prosecutions. Accordingly, petitioner prays that an order be made and entered providing such clarification.

Respectfully submitted,

/s/Whitney North Seymour, Jr.
Whitney North Seymour, Jr.

Washington, D.C.
December 11, 1986

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In Re: Michael K. Deaver Division No. 86-2

Supplemental Order

Before: MacKinnon, Presiding, Morgan and Mansfield, Senior Circuit Judges

Upon the petition of Independent Counsel Whitney North Seymour, Jr., appointed by order of this Court on May 29, 1986, it is hereby

ORDERED, by the Court, that the order of May 29, 1986 in the above entitled cause appointing Whitney North Seymour, Jr. as Independent Counsel is hereby amended and supplemented as follows:

With reference to the Court's filed order, page 2 paragraph 4. in the 5th line of said paragraph after the word "further" and before the word "ORDERED" in the next line, insert the following:

ORDERED, by the Court, that the jurisdiction of such Independent Counsel to investigate and prosecute any related matters developed in the course of his investigation shall include jurisdiction to investigate and prosecute any person or entity who

(1) has unlawfully conspired with or aided and abetted Michael K. Deaver to violate 18 U.S.C. Section 207 or any other provision of federal criminal law;

(2) has violated 18 U.S.C. Section 207 or any other provision of federal criminal law while acting as an officer or employee of Michael K. Deaver and Associates, Inc.; or

(3) has obstructed the due administration of justice, given false testimony, or made any false statement in violation of the Federal criminal law in connection with the investigation conducted by the Independent Counsel pursuant to this Court's order of May 29, 1986 or the preliminary investigations leading up to such order; and it is further

ORDERED, by the Court, that such Independent Counsel shall have jurisdiction to prosecute Michael K. Deaver for any willfully false material testimony given to the Subcommittee on Oversight and Investigation of the Committee on Energy and Commerce of the United States House of Representatives on or about May 16, 1986 relevant to any material matters within the jurisdiction of the Independent Counsel's investigation; and it is further

Per Curiam
For the Court

/s/George A. Fisher
George A. Fisher
Clerk

Supreme Court, U.S.
FILED
APR 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1279

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT

v.

THEODORE B. OLSON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

LOUIS R. COHEN
WILLIAM C. BRYSON
Deputy Solicitors General

JAMES M. SPEARS
ROBERT J. CYNKAR
Deputy Assistant Attorneys General

EDWIN S. KNEEDLER
RICHARD G. TARANTO
Assistants to the Solicitor General

ROBERT E. KOPP
DOUGLAS LETTER
THOMAS M. BONDY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether the Ethics in Government Act of 1978 violates the Constitution in providing for a court-appointed "independent counsel" who is empowered to conduct criminal prosecutions but who is not accountable to the President for the exercise of that power.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE UNITED STATES

This case presents the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. (& Supp. III) 49, 591-598. Those provisions require the Attorney General to seek, and direct a special division of an Article III court to appoint, an independent counsel to conduct certain criminal investigation and prosecutions, free of presidential superintendence. The interest of the United States in this case is in preserving an important part of the power and duty of the President to "take Care that the Laws be faithfully executed."

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution does not give the national government undifferentiated power, to be used by whatever officials and to whatever end might seem necessary and proper. Rather, it creates a government of limited and delegated powers, which are divided into " 'three defined categories, Legislative, Executive, and Judicial' " (*Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 6, quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)) and which are assigned separately to three distinct Branches of government: "[a]ll legislative Powers" to the Congress (Art. I, § 1), "[t]he executive Power" to the President (Art. II, § 1), and "[t]he judicial Power" to the Supreme Court and "such inferior Courts" as Congress may establish (Art. III, § 1). The Constitution specifically charges the President to "take Care that the Laws be faithfully executed" (Art. II, § 3). The independent counsel statute creates an office that lies outside this constitutional scheme.[1]

[1] Contrary to appellant's argument (Br. 24-29), this Court is not foreclosed from reaching the question of the constitutionality

The tripartite structure is at "the heart of the Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976). See, *e.g.*, *The Federalist No. 47*, at 301 (Madison) (C. Rossiter ed. 1961); *Id. No. 48*, at 308 (Madison); *Id. No. 72*, at 435 (Hamilton). "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Synar*, slip op. 14. They therefore made clear that the three Branches were to "be largely separate from one another" (*Buckley*, 424 U.S. at 120). Their objective, however, was not only "to 'diffus[e] power the better to secure liberty'" (*Snyar*, slip op. 6 (citation omitted)), but also to focus responsibility and accountability for the exercise of the powers of government. For that reason, the Constitution vests all executive power in "a single Person" (2 M. Farrand, *The Records of the Federal Convention of 1787*, at 171 (1937) (draft of Committee on Detail) (*Farrand*)) chosen by the people (Art. II, § 1, Cls. 2-3; Amend. XII), thus ensuring that a readily identifiable official could be held to account for its exercise.

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of the independent counsel statute. We share appellant's concern, reflected in *Blair* v. *United States*, 250 U.S. 273 (1919), that grand jury proceedings generally not be subject to interruption by witnesses' legal challenges to subpoenas. In this case, however, appellant herself did not object to the interruption of grand jury proceedings that occurred when appellees responded to subpoenas by challenging her authority to proceed (J.S. App. 9a n.6). Because appellees have been held in civil contempt for their refusal to comply with the subpoenas, there is a case or controversy between appellant and appellees, and the question whether to consider appellees' challenge is a matter of prudence and sound judicial administration. In light of appellant's failure to object to resolution of the constitutional questions by the district court, the unique and fundamental character of appellees' challenge to the prosecutor's authority, and the purely legal nature of that challenge, it was proper for the court of appeals to address the important constitutional questions presented. Cf. *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967); *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967); *American Trucking Ass'ns, Inc.* v. *ICC*, 747 F.2d 787 (D.C. Cir. 1984). It is likewise proper for this Court to do so.

The independent counsel statute has the opposite purpose and effect. It seeks to insulate from accountability to any elected official what all agree is an important part of the executive power—the power to investigate and prosecute serious crimes allegedly committed by certain high government officials and campaign officials. It vests that power in an officer who in her appointment to office, conduct while in office, and duration in office is not accountable to the President or, through him, to the people. Each appointment of an independent counsel thus creates a separate and politically unaccountable mini-Executive Branch, of limited but important jurisdiction, that is essentially supreme in its sphere. The stated justification for the statute is that personal or political loyalties may prevent, or be perceived to prevent, the President and his subordinates from properly discharging their duties under the Constitution and laws. But the statute's solution to the important problem of misconduct by high officials is contrary to the text and structure of the Constitution: it diffuses and misplaces the responsibilities the Constitution assigns to the President, and the responsibilities it assigns to the Congress and the Judicial Branch as well.

By taking purely executive power from the President and giving it to an officer not accountable to the President, the statute contravenes Article II's vesting of the "executive Power" in the President, absolving the President of, and disabling him from carrying out, his duty to "take Care that the Laws be faithfully executed," including the duty to see that wrongdoing by high officials is investigated and prosecuted. By providing for judicial appointment of the independent counsel, a purely executive and nonsubordinate officer, the statute contravenes the Appointments Clause (Art. II, § 2, Cl. 2), absolving both the President and the Senate of their responsibilities for the selection of officers of the United States. By insulating the independent counsel from removal except for misconduct or incapacity, the statute contravenes established principles recognizing the authority of the President to remove officers who exercise purely executive power. By

creating a prosecutor independent of the President, the statute also absolves Congress of its special constitutional responsibility to scrutinize the actions of high government officials, including the President. And by handing off to the Judicial Branch the responsibility for appointing a prosecutor, defining her jurisdiction, and overseeing her performance, the statute threatens to squander that Branch's invaluable resources of objectivity and detachment from political processes.

The possibility of personal and political conflicts of interest does not justify this sort of patchwork improvement on the Constitution. Except for the President himself, any individual having a personal or political relationship with persons who are the subjects of an investigation or accusation is subject to personal disqualification under existing laws and regulations, and Congress has ample powers to take further steps to deal with such conflicts. Congress may, for example, provide for the appointment of a special prosecutor outside any existing department but still accountable to the President. And Congress may ensure a check on the President's selection of such a prosecutor in the manner the Framers specifically prescribed: by making the appointment subject to the advice and consent of the Senate.

Conflicts of interest on the part of the President himself are another matter entirely: the responsibility for investigating and prosecuting alleged offenses of high officials in the President's Administration must remain with the President himself, where the Constitution places it, and Congress and the people should hold him accountable for his fulfillment of that responsibility, as they plainly have on important occasions in the past. The Constitution itself makes the President *both* politically accountable for the conduct of the principal officers of the Executive Branch *and* responsible for investigating, removing, and prosecuting such officers for their offenses. The Constitution does not contemplate that the President may be "disqualified" because of an impermissible "conflict" between his political interest and his responsibility as Chief Executive. Any such "conflict" is intrinsic to the vesting of all executive power in an elected President.

The problem of suspected wrongdoing at the highest levels of the Executive Branch reveals no gap in the constitutional scheme. The tools supplied by the Constitution to deal with this problem—*e.g.*, dismissal by the President, criminal prosecution by regular or special prosecutors within the Executive Branch, congressional investigation, and impeachment and its threat—have been used with success throughout our history. And if elected officials and their appointees fail to use these tools to root out wrongdoing, the people have the ultimate capacity to discern and punish such derelictions. Ad hoc devices intended to give important parts of law enforcement to the politically unaccountable do not buttress the constitutional structure; they dilapidate it. In this respect, the independent counsel statute is another attempt—like those encountered in *Synar* (use of Comptroller General as budget control mechanism), *Chadha* (legislative veto), and *Buckley* (congressional appointment of Federal Election Commissioners)—to accomplish by extra-constitutional mechanisms what those entrusted with the offices and powers created by the Constitution are thought to lack the will to do.

ARGUMENT

I. THE INDEPENDENT COUNSEL STATUTE UNCONSTITUTIONALLY TAKES EXECUTIVE POWER FROM THE PRESIDENT

A. Article II, Section 1, of the Constitution declares: "The executive Power shall be vested in a President of the United States of America." Section 3 of the same Article then charges the President with the corresponding duty: "he shall take Care that the Laws be faithfully executed." The independent counsel statute violates the plain meaning of those words by taking an important part of the executive power, and of the concomitant duty to see to the faithful execution of the laws, away from the President and assigning it to a person unaccountable to the

President in her selection *and* her performance *and* her tenure. The statute vests executive power other than in the President, in direct contravention of Article II, Section 1's "grant of power" (*Myers* v. *United States*, 272 U.S. 52, 151 (1926)), and relieves the President of his duty and his ability to see to the faithful execution of the laws, in direct contravention of Article II, Section 3.

It is not an accident that the whole of the executive power is vested in the President: the purpose was to create a unitary, vigorous, and independent Executive responsible directly to the people. See J.S. App. 27a; C. Thach, *The Creation of the Presidency, 1775-1789*, at 70-75, 119-123, 140-160 (1969); *id.* at vii (introduction by Herbert Storing); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 599-605 (1984). The Framers repeatedly expressed the importance of accountability to the people for the exercise of executive power. See 1 *Farrand* 65-67, 71-74, 96-97, 109, 254, 266-267; *The Federalist No. 68*, at 411-414 (Hamilton). They also explained the importance of unity in the Executive as a structural principle, which they adopted in reaction to experience with divided executive responsibility under the Continental Congress and in the state governments,[2] and after rejecting several proposals that would have diffused executive power.[3] Placement of the executive power "in

[2] See Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 68-69 (describing the disorganization that plagued the Continental Congress's efforts to direct the American Revolution); C. Thach, *supra*, at 52-53 ("state experience * * * taught the value of integration" in the Executive); *id.* at 31-34, 41-42 (describing state experience with a divided executive); *id.* at 62 (Confederation experience prompted demands for "unitary departmental control and integration" in execution of laws); *id.* at 57-68 (describing Confederation experience).

[3] The Convention rejected Edmund Randolph's proposal that the Executive consist of three members drawn from separate regions of the country. 1 *Farrand* 66, 71-74, 88, 91-92, 97. It also turned down proposals for the President to have a Privy Council, consisting either of the Chief Justice and the heads of executive departments

a single hand," Hamilton explained, was an essential attribute of the energy that was "a leading character in the definition of good government" (*The Federalist No. 70*, at 423, 424). It was also necessary to ensure the responsibility and democratic accountability for the powers vested in the elected President, since an absence of unity would "deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power"—"the restraints of public opinion" and "the opportunity of discovering with facility and clearness the misconduct of the persons they trust" (*id.* at 428-429). See also 1 Annals of Cong. 499 (J. Gales ed. 1789) (Madison) (referring to the "great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good").

Explaining the importance of focused responsibility, Hamilton observed that the Executive's "unity may be destroyed * * * by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others" (*The Federalist No. 70*, at 424). And James Wilson, later a Justice of this Court, explained to the Pennsylvania ratifying convention (2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (2d ed. 1836) (*Elliot's Debates*)):

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes.

(2 *id.* at 335-337) or of representatives of regions (*id.* at 533, 537, 542). The resolutions adopted to guide the Committee on Detail and that Committee's draft both expressly provided that the Executive was to consist of "a single Person" (*id.* at 132, 171).

Accord, 1 J. Wilson, *Works, Lectures on Law* 294-295 (1791); J. Story, *Commentaries on the Constitution of the United States* 520 (1987) (*Story*) (plurality in the Executive "diminishes the means, as well as the power, of fixing responsibility for bad measures upon the real authors").

The vesting of the executive power entirely in the President does not, of course, mean that the President must act personally in all matters, or that he alone decides how executive power shall be delegated. "[T]he President alone and unaided could not execute the laws" (*Myers*, 272 U.S. at 117), and the Constitution leaves Congress a wide discretion in structuring the government and in assigning particular functions to particular offices. But because the executive power, and the duty to take care that the laws be faithfully executed, are vested in the President alone, any officers who are to exercise that power must be his "subordinates" and "act for him under his direction" (*ibid.*).[4] As Hamilton explained, executive officers "ought to be considered as the assistants or deputies of the Chief Magistrate * * * and ought to be subject to his superintendence" (*The Federalist No. 72*, at 436). See *In re Neagle*, 135 U.S. 1, 64 (1890); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279-280 (1888).[5]

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[4] The Senate cites (Br. 21 & n.29) an 1823 opinion of the Attorney General in which he explained that the Constitution does not impose on the President the duty to execute the laws personally (1 Op. Att'y Gen. 624, 624-626). The same opinion also makes clear that the Constitution "places the officers engaged in the execution of the laws under [the President's] general superintendence" and that, if the President is not satisfied with their conduct, he may take steps "to cause them to be displaced, prosecuted, or impeached" (*id.* at 625).

[5] The fact that Congress may assign *non*discretionary duties to particular executive officers, and that the President may not instruct those officers to countermand their statutory orders (see *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 610-613 (1838)), is of course fully consistent with the President's duty to "take Care * * *." See Strauss, *supra*, 84 Colum. L. Rev. at 607 (footnote

To say that every officer who does exercise executive power "ought to be subject to [the President's] superintendence" does not eliminate all congressional choice in the assignment of functions among the Executive, Judicial, and Legislative Branches. There are some activities of government—supervising the conduct of congressional elections is one example—that do not fall necessarily into only one of the three powers, and which Congress probably could assign to more than one of the three Branches.[6] And our argument in this case does not require that the President's power of "superintendence" entail, in every case, the power of appointment to office *and* plenary power of direction while in office *and* plenary power of removal from office, especially in the case of officers whose functions are not purely executive.[7] That issue is not in this case. What Congress may not do is to establish an Executive Branch office to carry out functions that *are* inescapably executive, but wholly eliminate presidential superintendence, providing for the office to be filled by a person who is not appointed by the President or his subordinates, not subject to their direc-

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omitted) (the duty in *Kendall* "left no scope for judgment" and the decision accordingly "holds only that the President and other executive officials must act within the law").

[6] As Justice Stevens said in his concurring opinion in *Synar* (slip op. 14), "a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."

[7] Thus, as we explain below (pp. 29-33) in discussing *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), whether the President must be able to remove at will the members, appointed by him with Senate consent, of independent agencies that perform "quasi-legislative" and "quasi-judicial" functions presents questions quite distinct from those presented in this case.

Moreover, the President's accountability for the exercise of discretionary executive power is of course not imperiled by the ordinary protections against removal from office enjoyed by federal employees in the civil service, who are so situated in the hierarchy of authority leading up to the President that their every exercise of discretionary power is subject to control by a superior in that hierarchy. See *United States* v. *Perkins*, 116 U.S. 483 (1886).

tion while in office, and not removable except for misconduct or incapacity.[8] As we now explain, that is precisely what Congress has done in the independent counsel statute.

B. 1. As appellant concedes (Br. 52), "criminal prosecution is indisputably an 'executive'—as opposed to a 'legislative' or 'judicial'—function." This Court has so ruled on numerous occasions. See, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *Buckley*, 424 U.S. at 138; *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839).[9] See also S. Rep. 95-170, 95th Cong., 1st Sess. 5 (1977) ("The responsibility for law enforcement is placed upon the

[8] *Buckley*, 424 U.S. at 137-138, offers a close analogy. The members of the Federal Election Commission as then constituted were not appointed in accordance with the Appointments Clause. The Court therefore considered which of the Commission's powers could be exercised by commissioners not so appointed. The Court's answer was that certain powers "falling in the same general category as those powers which Congress might delegate to one of its own committees" could be exercised by the Commission, but other powers, notably the Commission's "enforcement power, exemplified by its discretionary power to seek judicial relief" (*id.* at 138), could not be so delegated, because "it is to the President, and not to the Congress, that the Constitution entrusts the responsibility 'to take Care that the Laws be faithfully executed'" (*ibid.* (citation omitted)).

[9] In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), the Court ruled that a court may appoint an attorney for the special purpose of assisting it in punishing contempts. The Court viewed that power as an integral part of the inherent Article III authority to ensure respect for the courts (slip op. 7-12) and carefully distinguished the task of prosecuting crime generally. The Court explained that merely because contempt is a crime "does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the executive branch may engage. * * * [T]hese proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court." *Id.* at 11-12.

executive branch of the Federal Government."). The decision whether to bring a prosecution in a particular case has long been recognized to lie within the discretion of the Executive Branch and not to be subject to judicial control. See *Nixon*, 418 U.S. at 693; *United States* v. *Thompson*, 251 U.S. 407, 415 (1920); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869); *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); see also *Ullman* v. *United States*, 350 U.S. 422 (1956) (immunity decisions); *Ex parte United States*, 287 U.S. 241 (1932).[10]

The decisions of an independent counsel require the exercise of the sort of policy discretion that is the very essence of the execution of the laws. Cf. *Synar*, slip op. 16-17. A prosecutor must decide not only the strength of a particular case but also "the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Wayte* v. *United States*, 470 U.S. 598, 607 (1985). A prosecutor must decide what position to take on unresolved issues of law and how such positions would affect other litigating positions. See *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984). Decisions whether to bring charges against a particular

[10] Judicial supervision of grand juries is wholly different. The grand jury, expressly referred to in the Fifth Amendment, has always been understood to be a distinctive institution, directly involving the people rather than an ordinary governmental office within one of the Branches; and limited judicial supervision of grand juries is considered an ancillary aspect of the Article III judicial power. See *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 423-424 (1983); *Brown* v. *United States*, 359 U.S. 41, 49 (1959). Even in that setting, courts have recognized that such supervision is constrained by separation-of-powers principles. *United States* v. *Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985); *United States* v. *Chanen*, 549 F.2d 1306, 1312 (9th Cir.), cert. denied, 434 U.S. 825 (1977). In any event, judicial supervision of grand juries involves no judicial role in the exercise of policy discretion. Nor is any involvement in prosecutors' policy decisions called for by the judicial role, expressly referred to in the Fourth Amendment, in making determinations of probable cause upon applications for warrants.

person, what charges to bring, and what sentences to recommend routinely involve value judgments about the seriousness of particular offenses. A prosecutor may also have to make policy decisions about whether a prosecution, or particular charges or information, should be pursued in light of the effect on matters such as national security, foreign policy, or economic policy. These and other discretionary policy judgments must be made at all stages of a prosecution, from the initiation of an investigation through the recommendation of a sentence. See Common Cause (CC) Br. 8.[11]

2. The independent counsel statute divests an important part of this power and responsibility for criminal law enforcement from the President and his subordinates, and transfers it to a person who is selected and appointed by a court and who is not accountable to the President for the decisions she makes once in office. The statute provides that an "appropriate" independent counsel is to be selected and appointed by a Special Division of the District of Columbia Circuit. 28 U.S.C. 49, 593(a). The independent counsel is then vested with "all investigative and prosecutorial functions and powers" of the Attorney General (except for certain wiretap-approval authority), including the power to appoint staff and to demand assistance from the Department of Justice. 28 U.S.C. 594(a), (c), and (d). Once a matter is in the hands of an independent counsel, the Department of Justice is directed to "suspend all investigations and proceedings regarding such matter," except insofar as the independent counsel directs. 28 U.S.C. 597(a), 594(d).

[11] For example, as Professor Cox testified, President Theodore Roosevelt decided not to prosecute United States Steel Corporation for an antitrust violation because such an action might have impaired business confidence during the economic recovery following the financial panic of 1907. *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 202 (1974). The current Iran/Contra investigation involves a host of foreign-relations and national-intelligence issues and has already required investigation in and contact with several foreign nations, including Israel. See also *United States* v. *Deaver*, No. 87-096 (D.D.C. June 22, 1987) (subpoena of Canadian ambassador); J.S. App. 57a-58a.

In exercising her authority, the independent counsel is supposed to be "truly independent" (S. Rep. 95-170, *supra*, at 70). While she is directed to follow Department of Justice policy generally, she is excused from doing so "where not possible" (28 U.S.C. 594(f)), and no one may second-guess her discretionary decisions on that score.[12] She may be removed, except by impeachment, only for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties" (28 U.S.C. 596(a)(1)), a standard that Congress intended to permit removal only for "misconduct" (H.R. Conf. Rep. 100-452, 100th Cong., 1st Sess. 37 (1987)). All parties agree that those provisions were designed to ensure independence from the entire Executive Branch, including the President. See *id.* at 37 ("[t]he 'good cause' removal standard is at the heart of the statutory mechanisms protecting the independent counsel's ability to act independently of the President's direct control"); S. Rep. 95-170, *supra*, at 65-66 ("[t]he entire purpose of appointing * * * [an independent counsel] is to get someone who is independent * * * from the President and the Attorney General"); S. Rep. 97-496, 97th Cong., 2d Sess. 2 (1982).

The statutory text and legislative history thus make clear that the independent counsel is in no sense a sub-

[12] The Senate Committee indicated in 1982 that compliance with Justice Department policies was only a "goal" (S. Rep. 97-496, 97th Cong., 2d Sess. 16) and that the independent counsel "should be guided by his perception of fundamental fairness and of what is required to conduct the investigation conscientiously" (*ibid.*). The Committee further stated that the statute "should not be interpreted to mean that failure of the [independent counsel] to follow Departmental policies would constitute grounds for removal * * *. [This] would seriously compromise the [counsel's] independence" (*ibid.*). Contra, App't Br. 58; Sen. Br. 25 n.34; CC Br. 9.

ordinate of or accountable to the President. It is the court that determines which individual, with what experience, outlook, and judgment, would be an "appropriate" person to exercise the power of criminal prosecution. Once appointed, the independent counsel is essentially supreme in her sphere. And to whatever extent she is not supreme, an independent counsel is in significant respects subordinate and accountable more to the Judicial Branch than to the President.

The independent counsel owes her selection and appointment to the Special Division in the first place. She also owes her grant of jurisdiction to the Special Division: the Division is not bound by the Attorney General's proposal for the scope of the independent counsel's authority, but defines her jurisdiction itself. 28 U.S.C. 593(b); see S. Rep. 95-170, *supra*, at 64.[13] In addition, the Special Division has the authority to terminate an appointment on its own motion on the ground that the investigation is fully or substantially complete (28 U.S.C. 596 (b)(2)), a provision that is "intended to deal with situations where [an independent counsel] is attempting to prolong his office beyond the time it is really needed" (H.R. Rep. 95-1307, 95th Cong., 2d Sess. 11 (1978)).

[13] The Special Division exercised that authority in the case for which amicus Walsh was appointed: after receiving a letter from several Members of Congress, it defined his jurisdiction to include more events and persons than those included in the Attorney General's application. See *In re North*, No. 86-6 (D.C. Cir. Indep. Counsel Spec. Div. (Order of Dec. 19, 1986)); *In re Sealed Case*, 829 F.2d 50, 65 n.3 (D.C. Cir. 1987) (Williams, J., concurring in part and dissenting in part), cert. denied, No. 87-869 (Jan. 19, 1988).

Under 28 U.S.C. 594(e), an independent counsel "may ask the Attorney General or the division of the court to refer matters related" to her original jurisdiction. The Special Division ruled in *In re Olson*, 818 F.2d 34, 48 (1987), that the division could not grant such a request after the Attorney General had denied it. Whether the independent counsel could bypass the Attorney General altogether was not discussed. In the 1987 reauthorization, Pub. L. No. 100-191, 101 Stat. 1293, Congress made clear that such a bypass is authorized. See H.R. Rep. 100-316, 100th Cong., 1st Sess. 28-29 (1987).

Also, before terminating her office, the independent counsel must file a report with the Special Division setting forth "fully and completely" the work of her office and the reasons for any decision not to prosecute (28 U.S.C. 595(b)(2)). Finally, if an independent counsel is removed from office by the Attorney General, she may obtain review of the removal, and possibly reinstatement, from a federal district court (§ 2, 101 Stat. 1305, to be codified at 28 U.S.C. 596(a)(3)).

This close relationship to the Judicial Branch highlights the absence of accountability to the President. Moreover, the degree of subservience to the Judicial Branch hardly comports with the prohibition on even modest inter-Branch encroachments that is established by *Synar*, *Buckley*, and *Myers*. And to the extent that the various functions assigned to the courts create, in practice, a "superintending" relationship between them and the independent counsels, that function is inconsistent with the long-standing restriction of Article III courts to the deciding of cases and controversies and various ancillary functions. See pp. 23-24, *infra*; J.S. App. 74a-87a; *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 (1970) (court may keep its "own house in order").

3. Appellant and her amici argue (*e.g.*, App't Br. 18-19, 48; Walsh Br. 12, 24) that the independent counsel statute is nevertheless rendered valid by the fact that no appointment can be made unless the Attorney General requests one (28 U.S.C. 593(b)), apparently suggesting some sort of waiver of Executive Branch rights. But apart from the fact that Article II does not allow the President to waive either his executive power or his duty to take care that the laws are faithfully executed,[14]

[14] Cf. *Chadha*, 462 U.S. at 942 n.13. The Constitution plainly would not allow the President to give an Article III court the power to appoint a special Secretary of State who would thereafter independently conduct one section of the Nation's foreign affairs; neither does it allow the Attorney General to give irretrievably away the President's responsibility for the discretionary law en-

there is no voluntary waiver under the relevant provision of the Ethics in Government Act. Contrary to the suggestion of appellant (Br. 18-19) and some of her amici (*e.g.*, H.R. Spkr. Br. 14; ABA Br. 11), the Attorney General's decision to request an appointment in a case like this one, although not subject to judicial review (*Nathan* v. *Smith*, 737 F.2d 1069 (D.C. Cir. 1984)), is mandated by statute. In specified circumstances, the Attorney General "shall conduct" a preliminary investigation (28 U.S.C. (Supp. III) 591(a)), and he "shall apply" for an appointment if the standard for doing so is met—if he finds "reasonable grounds to believe that further investigation or prosecution is warranted" or he cannot find the contrary after a specified time (28 U.S.C. 592(c)(1)).[15] These legal obligations could be viewed as discretionary only on the cynical view that a duty that is not judicially enforceable is no duty at all.

II. THE INDEPENDENT COUNSEL STATUTE VIOLATES THE APPOINTMENTS CLAUSE

The Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) is not a mere matter of "etiquette or protocol" (*Buckley*, 424 U.S. at 125). It is an essential aspect of the separation of powers that is "woven into the [Constitution]" (*id.* at 124). It *enables* the President "to take Care that the Laws be faithfully executed" through the appointment, for which he is politically accountable, of the officers who help him execute the laws.[16]

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forcement decisions (regarding, *e.g.*, charges, grants of immunity, pleas) made by the independent counsel.

[15] In addition, the Attorney General must base his decision on limited information, because he is expressly forbidden to use compulsory grand jury process or to issue subpoenas in conducting his preliminary investigations. 28 U.S.C. 592(a)(2). Under the 1987 reauthorization, he is also barred from rejecting referral based on the target's state of mind. § 2, 101 Stat. 1295, to be codified at 28 U.S.C. 592(a)(2)(B).

[16] Madison noted: "[i]f there is a principle in our Constitution * * * more sacred than another, it is that which separates the

As the court of appeals ruled, the independent counsel statute contravenes the Appointments Clause in two ways. First, an officer who exercises prosecutorial power in an important class of cases, and who is not subordinate to any superior in the exercise of that power, cannot be an "inferior" officer and hence must be appointed by the President with the advice and consent of the Senate. Second, even inferior officers who exercise executive power must be appointed by the President or by a head of department appointed by him. These two points are closely related aspects of a single larger point: the duty of the President to "take Care" means that *he*, with the help of the Senate in certain cases and acting on his own or through his heads of departments in others, is responsible and accountable to the people for selecting those persons who will exercise significant authority in executing the law. The Appointments Clause was meant to implement that presidential responsibility, not to frag-ment it.

A. The Appointments Clause Does Not Permit Congress to Vest the Appointment of Executive Officers in the Courts of Law

The Appointments Clause, which deals with appointments of both Executive and Judicial Branch officers, says that Congress may vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." But only a reading blind to the constitutional context would allow Congress to vest the appointment of *any* inferior officer in *any* of those authorities. As this Court said in *Myers*, 272 U.S. at 117, and repeated in *Buckley*, 424 U.S. at 135:

> "[T]he President alone and unaided could not execute the laws. He must execute them by the assist-

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Legislative, Executive, and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices." 1 Annals of Cong. 581.

> ance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."

The essential role of appointments in the President's fulfillment of his constitutional duties thus compels the obvious alternative reading of the Appointments Clause—that Congress could empower the President or heads of executive departments to appoint inferior executive officers, while the courts of law could be authorized to appoint inferior judicial officers. That reading is also compelled by the history of the Clause.[17]

1. The reference to "Courts of Law" in the Appointments Clause is what permits Congress to authorize the courts to appoint their own inferior officers, as they have been authorized to do with the clerks of court since 1789. See Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 76; *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 257-258 (1839); 28 U.S.C. 671(a), 711(a), 751(a); see also 28 U.S.C. 631(a) (court appointment of magistrates). To read the reference as also allowing judicial appointment of executive officers would run counter to the structure of the Constitution as a whole and of the Clause in particular. The separation of powers is so fundamental to the constitutional plan (see *The Federalist No. 47* (Madison)) that the Appointments Clause should not be construed to permit one Branch to play a formal role in the selection or removal of the officers of another Branch that the Constitution does not explicitly authorize. See

[17] Judge J. Skelly Wright rejected the contrary reading of the Appointments Clause in his dissent in *Hobson* v. *Hansen*, 265 F. Supp. 902, 921 (D.D.C. 1967): "Its language very naturally admits the common-sense reading that courts of law and the other listed offices were meant to appoint only those officers 'inferior' to them * * *. And the narrower reading harmonizes with the most apparent purpose of Article II: to let Congress clothe Secretaries and courts with the necessary authority for filling vacancies in their own staffs."

Synar, slip op. 6-8; 1 Annals of Cong. 462 (Madison's argument for not extending the Senate's advice-and-consent role to removals); *Myers*, 272 U.S. at 122-123; cf. *Buckley*, 424 U.S. at 127; *Chadha*, 462 U.S. at 955-956. Moreover, the Clause itself is written to establish presidential appointment, with Senate consent, as the general rule—applicable to appointment of not only the Justices of this Court and "Ambassadors, other public Ministers and Consuls" but also "all other Officers of the United States, whose Appointments are not herein otherwise provided for" (Art. II, § 2, Cl. 2). This general rule emphatically affirms the principle of presidential responsibility for the appointment of every officer of the Executive Branch other than the President himself and the Vice President. The inferior officer portion of the Appointments Clause, as a subsidiary clause addressing matters of detail, should not be read to impair that fundamental principle.

2. The history of the Appointments Clause belies the notion that the inferior officer portion was intended to do anything so extraordinary as allow for judicial appointment of executive officers. That portion of the Clause was added at the end of the Constitutional Convention and with little discussion. After much debate about the mode of appointments generally, the Committee on Style reported on September 12, 1787, what is now the first portion of the Clause (2 *Farrand* 599), which provides for presidential appointment and Senate confirmation of all officers and which, of course, would not allow courts to appoint executive officers. On September 15, 1787, the final working day of the Convention, the inferior officer provision was added (*id.* at 627-628) as one of a number of rapidly considered changes in the document (*id.* at 621-633).

The origins of this last-minute addition suggest a modest objective. Earlier, George Mason had complained that requiring Senate confirmation of all appointments, even of the "smallest" offices, would be "unwieldy [and] expensive" (2 *Farrand* 537). Rufus King had responded

that he "did not suppose it was meant that all the minute officers were to be appointed by the Senate, or any other original source, but *by the higher officers of the departments to which they belong*" (*id.* at 539 (emphasis added)). On September 15, Gouverneur Morris made the proposal to add the inferior officer clause, without explanation but presumably in order to resolve any uncertainty on this point (*id.* at 627). Like King before him, Madison suggested the addition might be unnecessary: "It does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices" (*ibid.*). Morris responded that "[t]here is no necessity" for going even further, because "Blank Commissions can be sent" (presumably by the President or department head) (*ibid.*). After the proposal was initially rejected by an equally divided Convention (*id.* at 627-628), "[i]t was urged that it be put a second time, some such provision being too necessary, to be omitted"; the proposal was then adopted (*ibid.*). Nothing in this history suggests any intent except to relieve the Senate and even the President of the burden of appointing lesser officers; certainly this history does not remotely suggest an intent to permit the Judicial Branch to appoint Executive Branch officers, in derogation of the responsibility of *both* of the political Branches.

The discussion of the history of the Clause by amicus Senate (Br. 32-37) confirms this conclusion. While, from the beginning of the Convention, "[t]he matter of the appointment of officers of the new Federal Government was repeatedly debated" (*Buckley*, 424 U.S. at 271 (White, J., concurring in part and dissenting in part)), the debate focused on who should appoint the Judiciary and Ambassadors. The question of who should appoint the members of the unelected Branch plainly presented a special problem. And the debate over who should appoint Ambassadors (and other foreign ministers) was part of a larger debate over the Senate's role in foreign affairs; that debate was itself not resolved until the end

of the Convention, when the Framers settled on appointment-confirmation and treaty-ratification roles for the Senate (Art. II, § 2, Cl. 2), roles smaller than the more prominent role in foreign affairs (making treaties and appointing Ambassadors) the Convention had previously considered for the Senate.[18] In all the discussion, however, no one ever suggested that courts might be allowed to appoint executive officers. Nor did the Convention ever consider adopting any proposal that would have vested the power to appoint executive officers (other than foreign ministers) anywhere but in the Executive Branch itself. Indeed, from Madison's resolution of June 1 (1 *Farrand* 67), through Resolution 9 of the Committee on the Whole of June 13 (*id.* at 236), through the draft of the Committee on Detail of August 6 (2 *Farrand* 185), and the report of the Committee on Style of September 12 (*id.* at 599), the working documents of the Convention expressly provided for executive appointment of all executive officers (excepting foreign ministers).

3. The early post-Convention historical evidence of the Framers' intent confirms that the Appointments Clause was not meant to authorize judicial appointment of executive officers. Madison, in *The Federalist No. 51* (at 321), stated one basic principle: "each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others." Hamilton, in *The Federalist No. 72* (at 435-436), stated the correlative principle: executive officers "ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment." [19]

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[18] 2 *Farrand* 183 (report of Committee on Detail); *id.* at 498; see C. Thach, *supra*, at 114-115, 127-130, 134-138.

[19] In *The Federalist No. 69* (at 421-422) and *The Federalist No. 77* (at 460-462), Hamilton objected to the secrecy and absence of personal responsibility where appointment is vested in a small council. The provision for appointment of executive officers by the

The "Federal Framer" explained during the ratification debates that "judges, and principal officers in the departments will be well informed men in their respective branches of business; that they will, from experience, be best informed as to fill inferior offices in them; that they will feel themselves responsible for the execution of their several branches of business, and for the conduct of the officers they may appoint therein." 2 H. Storing, *The Compleat Anti-Federalist* 308 (1981). Justice Story's discussion of the Appointments Clause in his 1833 commentary on the Constitution likewise contains no suggestion that he believed the Clause could be used to support such appointments (*Story* 563-567).[20] In *Ex parte Hennen*, 38 U.S. (13 Pet.) at 257-258, this Court explained: "The appointing power here designated, in the latter part of the [Clause], was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." None of these discussions of the inferior officer clause, nor any other explanation that appellant and her amici have unearthed from the period, states anyone's

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three-member Special Division of the District of Columbia Circuit, after deliberations, raises the very concerns Hamilton identified. Although multi-member "Courts of Law" commonly appoint their own clerks and other officers, the appointing authority in that situation is the same as that to which the officer reports.

[20] The contrary suggestion of amicus Common Cause (Br. 25) is incorrect. Justice Story's discussion of the "discretion" of Congress states nothing more than what appears from the text of the Appointments Clause: that Congress has discretion, for inferior officers, to choose not to require presidential nomination with Senate confirmation but instead to rely on the second portion of the Clause. Justice Story's discussion does not state that Congress has discretion to vest appointment of executive officers in the courts. Indeed, in explaining the virtues of this discretion, Justice Story stated: "In one age the appointment might be most proper in the president; and in another age, in a department" (*Story* 566). He omitted any reference to the third of the appointing authorities mentioned in the inferior officer portion of the Clause, viz., the courts.

belief that the Clause authorizes judicial appointment of executive officers.

4. The Framers' commitment to an independent judiciary, expressed in the constitutional protection of tenure during good behavior (Art. III, § 1), further demonstrates the anomalous nature of a reading of the Appointments Clause that would permit judicial appointment of executive officers. Beginning in 1792, this Court and its members have steadfastly rejected attempts to assign to the courts "executive or administrative duties of a nonjudicial nature" (*Buckley*, 424 U.S. at 123). See, *e.g.*, *Muskrat* v. *United States*, 219 U.S. 346 (1911); *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1791).[21] In this, the Court has accurately reflected the Framers' vital concern that the judiciary remain independent from the other Branches. See, *e.g.*, 1 *Farrand* 98-99 (rejecting judicial participation in Council of Revision); 2 *id.* at 298; *The Federalist No. 47*, at 302 (Madison) (quoting Montesquieu: "'[t]here can be no liberty' * * * 'if the power of judging be not separated from the legislative and executive powers'"); *The Federalist No. 78*, at 466 (Hamilton) (same). The power to select executive officers—particularly, those officers who are authorized to investigate and prosecute politically sensitive crimes—not only intrudes upon the President's responsibilities, but might also, as then-Professor Frankfurter said of the courts giving advisory opinions, "involve the judges too intimately in the process of policy and thereby weaken confidence in the disinterestedness of their judicatory functions." 1 *Encyclo-*

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[21] A different question is presented by the voluntary assumption of certain duties by individual judges, as opposed to the courts themselves, at the behest of Congress or the Executive. The precedent for such practices includes Chief Justice Jay's service as Ambassador to England (while he served as Chief Justice) and Justice Jackson's service at the Nuremberg War Crimes Trials. See *In re President's Comm'n on Organized Crime (Subpoena of Scarfo)*, 783 F.2d 370, 377-378 (3d Cir. 1986).

paedia of the Social Sciences 478 (1980). Judicial power to appoint executive officers would thus stand in stark contrast to the Framers' vision of an independent judiciary, and that power should not be inferred in the absence of any evidence that such power was intended.

B. An Officer Who Exercises Prosecutorial Power, and Who is not Subordinate to Anyone in the Exercise of That Power, is not an "Inferior" Officer

The Appointments Clause requires presidential appointment and Senate confirmation of all except "inferior Officers." That requirement was intended to ensure accountability to the people—through both political Branches—for the appointment of those officers of the United States who are vested with primary responsibility for exercising the executive and judicial powers and thereby affecting the lives, liberty, and property of the people. The independent counsel statute violates that requirement because it vests complete and final authority to exercise the governmental power that most dramatically affects people—the power to bring a criminal prosecution—in a person who is not accountable to the people through either political Branch. Compare *The Federalist No. 65*, at 398 (Hamilton). The various interpretations of the term "inferior" advanced by appellant and her amici fail to come to grips with this fundamental defect.

1. Appellant first proposes (Br. 31-32) that all officers except those expressly named in the first portion of the Appointments Clause—Supreme Court Justices, ambassadors, and other public ministers and consuls—are inferior officers, but that proposal encounters a sea of troubles. First, it ascribes no sensible meaning at all to the word "inferior": for example, it makes the Secretary of State, who is not named, "inferior" to the ambassadors who report to him. Second, it would render department heads inferior officers, contrary to Congress's consistent practice and the First Congress's specific view of the matter (J.S. App. 12a n.8). Third, it would apparently allow Congress to vest in a single department head the authority to appoint all of the other department heads in the President's Branch—and in a single court all federal court judges except the Justices of this Court. There is no indication in the history of the inferior officer portion of the Clause that this last-minute addition was intended to displace the carefully worked-out provision for presidential nomination and Senate confirmation of the principal officers of the government.

2. Amicus Walsh seeks to avoid those difficulties by suggesting (Br. 10) that an inferior officer is any officer not "'specially mentioned'" (quoting *United States* v. *Germaine*, 99 U.S. 508, 510 (1879)) in the Clause as a whole, *i.e.*, all officers except Justices and ambassadors, etc., to which Amicus Walsh adds (*ibid.* (footnote omitted)) "'those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments.' *Collins v. United States*, 14 Ct. Cl. 568, 574 (1879)." This view seeks to establish a different "bright line" (Walsh Br. 12) that avoids the grosser anomalies of appellant's initial proposal. But the Walsh proposal uses the text merely for convenience—and imprecisely at that—while ignoring its purpose.

Nothing in the Clause or the history of its drafting suggests that the expression "inferior Officers" was supposed to mean precisely all those not named in either the first or second portion of the Clause. The purpose of the second portion of the Clause was to designate permissible appointing authorities for certain subsidiary officers, not to list "specially mentioned" officers requiring presidential nomination and Senate confirmation. Indeed, amicus Walsh's ingenious proposal could work only by ignoring the difference between "*Courts of Law*," which are authorized to be given appointing authority, and federal *judges*, who (except for the Justices of this Court) are not specially mentioned in the Appointments Clause at all. For this reason, contrary to the statements of amicus Walsh and the *Collins* court (Br. 10),

individual federal judges may not be granted authority to appoint officers (though they may hire employees). Conversely, federal judges themselves are principal officers who must be appointed by the President with Senate confirmation; but the reason is not that they are specially mentioned, which (except for Justices of this Court) is not the case, but that they have tenure protection and are not subordinate or accountable to anyone in the performance of their duties, although the decisions of the courts on which they sit are reviewable. *Hennen*, 38 U.S. (13 Pet.) at 258; *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (plurality). Appellant likewise has tenure protection and is not subordinate.

3. Appellant offers (Br. 33-35) yet another reading of the term "inferior Officers," which would include those of lesser "rank," "status," or "importance"—to be determined by examining their compensation, the scope of their duties, and their tenure, but *not* their place in the decision-making hierarchy. As amicus Walsh points out (Br. 12 (citation omitted)), this proposed test is "fuzzy," "amorphous," and "vague" and employs "'criteria of decision that necessar[il]y escap[e] the judicial grasp.'" Also, if an officer wields final governmental authority and is essentially supreme in her sphere, it is at the very least awkward to say that that officer is "inferior" just because her job is of limited scope and duration (perhaps even limited to a single case). Certainly as far as the people affected by the exercise of her power are concerned, she is not inferior in any meaningful sense. Moreover, appellant's test would, for appointment purposes, allow Congress to shatter the Executive Branch into a thousand small offices, each of limited scope (and perhaps short term and relatively low pay), and provide that each would be filled without presidential nomination and Senate consent. This is not the way the Framers intended the Executive Branch to be formed.

4. The root difficulty with all these proposals is that their objective is to make it possible for an officer to be

"inferior" without being subordinate to any "superior" in the exercise of her powers. Though subordinacy is not a sufficient condition to establish that one is an "inferior officer," it surely is a necessary condition. A person who exercises sufficient governmental authority to be an "officer" (see *Buckley*, 424 U.S. at 126-127) and who is supreme in her sphere cannot in fairness or ordinary usage be described as an "inferior officer." [22]

That subordinacy is a necessary condition for inferiority within the meaning of the Appointments Clause is indicated by this Court's repeated references to subordinacy in speaking of "inferior Officers." See *Nixon*, 418 U.S. at 694; *United States* v. *Eaton*, 169 U.S. 331, 343 (1898); *Germaine*, 99 U.S. at 511; *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 392-395 (1868); see also *Collins* v. *United States*, 14 Ct. Cl. 568, 574 (1879). It is also confirmed by the Constitution's authorization to create "inferior Courts" (Art. III, § 1), which was almost certainly understood to contemplate a closely related sort of subordinacy—*i.e.*, that their decisions would be subject to review by this Court (with "Exceptions"). Hamilton, in *The Federalist No. 81*, twice described the "inferior Courts" as "subordinate" to the Supreme Court

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[22] In *United States* v. *Eaton*, 169 U.S. 331 (1898), the Secretary of State's temporary appointment of a vice-consul as Consul was upheld under the inferior officer portion of the Appointments Clause (even though "Consuls" are listed in the first portion of the Clause). The vice-consul was a subordinate officer. *Eaton* further suggests, by its reference to the temporary and emergency nature of the appointment, that subordinacy is only a necessary, and not always a sufficient, condition of status as an inferior officer. See also 2 *Farrand* 627 (Madison's reference to "Superior Officers below Heads of Departments"). Similarly, a department head would be structurally subordinate to the President, but he likely would be deemed to have the status and responsibilities of a principal officer, not only for historical reasons but also because he (rather than the President personally) is vested with final statutory authority over all matters within his department. Cf. Classification Act of 1923, ch. 265, § 2, 42 Stat. 1488 ("'the head of the department' means the officer or group of officers in the department who are not subordinate or responsible to any other officer of the department").

(*id.* at 485 n.*, 490). There is no reason to think the Framers used a different concept in the Appointments Clause from what they used in Article III.[23]

Taken together, appellant's contentions that an officer exercising discretionary executive power can be inferior without being subordinate, and can be appointed by a court of law, would rend the constitutional design. The Framers deliberately provided for presidential nomination with the safeguard of Senate confirmation as the general rule because they believed that method of appointment would help ensure responsible and politically accountable selection of those officers with primary authority in the administration of the laws. See *The Federalist No. 76*, at 457 (Hamilton). It would seriously undermine this judgment to permit Congress to avoid this mechanism by providing, as Congress has done in the independent counsel statute, for judicial appointment of an officer who, once appointed, would not be subordinate to any other executive officer, including the President, and hence would have the sort of final decision-making authority that renders presidential nomination and Senate confirmation most important.[24] An independent counsel has a truly separate fiefdom that is autonomous in its congressionally assigned sphere and that displaces the Branch headed by the President. She is in no sense "inferior" even to the President.

[23] Dr. Samuel Johnson, in his *Dictionary of the English Language* (7th ed. 1785), defined "inferiour" to mean (1) "[l]ower in place," (2) "[l]ower in station or rank of life: correlative to *superiour*," (3) "[l]ower in value or excellency," and (4) "[s]ubordinate." Contrary to the suggestion of appellant (Br. 35) and her amici (*e.g.*, CC Br. 25; Walsh Br. 13-14 n.14), we fail to see how that definition in any way undermines the hierarchical reading of the word "inferior" in the context of a constitutional provision concerned with governmental structure.

[24] That the Appointments Clause singles out Justices and various foreign ministers reflects this concern. Justices, once appointed, serve during good behavior, and foreign ministers, in the Eighteenth Century, had to carry out much of their work without means of quick contact with the government at home. Responsible appointment is in both cases especially important.

III. THE LIMITATIONS ON THE REMOVAL OF THE INDEPENDENT COUNSEL ARE INCONSISTENT WITH THIS COURT'S DECISIONS IN *MYERS*, *HUMPHREY'S EXECUTOR*, AND *WIENER*

Even if the independent counsel were properly appointed, it would not be permissible to limit so severely the President's power to remove her, denying that power altogether except for misconduct or incapacity. The duties of an independent counsel are purely executive in nature, and they therefore can be performed only by an officer who is accountable to the President. Whatever limits Congress may constitutionally impose on the President's various means of holding other officers to account, it may not deny his power to remove purely executive officers like an independent counsel.

A. This Court said in *Myers* that the Constitution confers on the President the unrestricted power to remove officers who were appointed by him with the advice and consent of the Senate and who carry out his responsibility for the faithful execution of the laws. The Court regarded this power of removal as an element of the "executive Power" that is essential to the President's fulfillment of his obligation to take care that the laws be faithfully executed. 272 U.S. at 162-164, 177.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court, while not questioning the result in *Myers*, held that the Constitution does not bar Congress from imposing limitations on the President's ability to remove a member of a commission (the Federal Trade Commission) that was charged by Congress with the exercise of certain "quasi-judicial" and "quasi-legislative" functions (295 U.S. at 628-629).[25] After it "carefully

[25] The FTC's functions that the Court described as "quasi-legislative" or "quasi-judicial" were quite limited. In particular, they did not include rulemaking power, as the FTC did not claim such authority until 1962. See *National Petroleum Refiners Ass'n* v.

emphasized" (*Buckley*, 424 U.S. at 133, citing 295 U.S. at 625-626) that the Commissioner was appointed by the President with Senate consent, the Court reasoned that Congress has the authority to create such bodies and to require them to act independently of executive control in the discharge of their duties, and that this authority "includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime" (*id.* at 629). The Court stressed its view that the FTC was "wholly disconnected [with] the executive department" (*id.* at 630) and "exercise[d] no part of the executive power vested by the Constitution in the President" (*id.* at 628).[26] The Court expressly did not disturb the decision in *Myers* insofar as it sustained the President's "illimitable power" (*id.* at 627- 629) to remove "purely

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FTC, 482 F.2d 672, 693 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974); *Synar* v. *United States*, 626 F. Supp. 1374, 1397 n.24 (D.D.C. 1986) (three-judge court), aff'd, *Bowsher* v. *Synar*, *supra*. The FTC's functions at the time included the conduct of investigations on behalf of Congress (see 295 U.S. at 621, 628), individual adjudications (see *id.* at 620-621, 624, 628, 629), and the performance of duties as a master in chancery (see *id.* at 621, 628, 630). See 15 U.S.C. (1940 ed.) 45, 46, 47.

[26] Amicus Walsh suggests (Br. 25) that the FTC Commissioners did exercise executive power, but that suggestion rests on a misleading description of the powers of the FTC Commissioners at the time of *Humphrey's Executor*. Aside from "investigating antitrust violations," which obviously may be a legislative function, the Commissioners, amicus Walsh states, were charged with "filing complaints stating the charges, and going to court to enforce cease-and-desist orders." To the extent that that language is meant to suggest that the FTC could initiate actions in court, the suggestion is false. The FTC could file only *administrative* complaints, in order to initiate its own internal proceedings (15 U.S.C. (1940 ed.) 45 (b)); and it could "go[] to court to enforce cease-and-desist orders" only by being named as *a defendant* in a judicial challenge brought by a party subject to such an order (15 U.S.C. (1940 ed.) 45(c)). The FTC statute provided for initiation of a court action to enforce an order of the Commission only by "the Attorney General of the United States, at the request of the commission" (15 U.S.C. (1940 ed.) 50).

executive" officers (*id.* at 631, 632), such as the postmaster in *Myers*, who was "an executive officer restricted to the performance of executive functions" (*id.* at 627).

The Court reached a similar result in *Wiener* v. *United States*, 357 U.S. 349 (1958), which also involved officers appointed by the President with Senate consent. Noting that *Humphrey's Executor* had disapproved the broad dicta in *Myers* concerning the constitutional power of the President to remove members of "quasi-judicial" bodies (357 U.S. at 352), the Court held that Congress likewise could limit the power of the President to remove members of the War Claims Commission, in view of the "intrinsic judicial character" of the Commission's duties (*id.* at 355). As in *Humphrey's Executor*, the Court expressly did not disturb the decision in *Myers* as regards the President's "illimitable" power to remove " 'all purely executive officers' " (*id.* at 352 (quoting 295 U.S. at 626-627)).

B. The independent counsel's responsibilities are wholly different from those at issue in *Humphrey's Executor* and *Wiener*. The independent counsel does not exercise "quasi-legislative" or "quasi-judicial" power or have duties of an "intrinsic judicial character." In the Constitution's language, her sole job is to "execute" the criminal law, a duty the Constitution vests in the President, and no one, therefore, can be more a "purely executive" officer than she. This conclusion is reinforced by the character of the functions and offices that the independent counsel supplants. Cf. *Chadha*, 462 U.S. at 952-953. The independent counsel is vested with full authority, in connection with the alleged crimes under her jurisdiction, "to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice" (28 U.S.C. 594(a)). The Attorney General, as the chief federal prosecutor and the head of an executive department, must serve only at the pleasure of the President. Within her jurisdiction, an

independent counsel is the chief federal prosecutor and the head of the Attorney General's Department. Accordingly, she too must serve at the pleasure of the President (or of someone, such as the Attorney General, who so serves). See *Chabal* v. *Reagan*, No. 87-5751 (3d Cir. Mar. 14, 1988), slip op. 5-7, 8-10 (United States Marshals are "purely executive officers" who may be removed by the President at will); *Morgan* v. *TVA*, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941) (head of TVA removable at will).

We emphasize that the removability of members of "independent agencies" presents a quite different question. First, those officers are appointed by the President with Senate consent, so the question in those cases is not one of total elimination of accountability to the President. Second, Congress has specifically withheld from those agencies the purely executive power of criminal law enforcement.[27] Third, those agencies, unlike independent counsels, frequently carry out specific adjudicatory, information-gathering, and other functions that may not be uniquely assignable to the Executive Branch. Fourth, the statutory provisions that insulate members of independent agencies from removal at will by the President vary considerably and might be interpreted to include disobedience to a presidential directive on a matter within the President's authority as a ground for removal and thus to impose barriers significantly lower than "misconduct" (see p. 13, *supra*).[28] The Court need

[27] See, *e.g.*, 15 U.S.C. 56(b) (FTC must refer criminal matters to Attorney General); 15 U.S.C. 77t(b) (same for SEC); 15 U.S.C. 2076(b)(7)(B) (same for CPSC); 47 U.S.C. 401(c) (same for FCC); 49 U.S.C. (& Supp. III) 11703 (same for ICC). See also 28 U.S.C. 547 (criminal prosecution reserved to U.S. Attorneys, under the direction of the Attorney General, "except as otherwise provided by law"); 2 U.S.C. 437d(a)(6) (FEC given only civil enforcement power); 7 U.S.C. (& Supp. IV) 4a(e), 13a-1 (same for CFTC); 42 U.S.C. 7171(i) (same for FERC).

[28] See, *e.g.*, 15 U.S.C. 2053(a) (CPSC: removable for "neglect of duty or malfeasance in office but for no other cause"); 47 U.S.C. 154(c) (FCC: no specified standard for removal); 12 U.S.C. (&

not address the significance of those distinctions here: the constitutionality of independent agency removal arrangements is neither at issue nor at stake in this case.

IV. NEITHER THIS COURT'S DECISIONS NOR PRIOR FEDERAL PRACTICES PROVIDE PRECEDENT FOR VESTING PURELY EXECUTIVE POWER IN AN OFFICER WHO IS APPOINTED BY A COURT AND IS NOT ACCOUNTABLE TO THE PRESIDENT

Appellant and her amici seek support for the independent counsel statute in certain judicial decisions, particularly *Ex parte Siebold*, 100 U.S. 371 (1880). But neither *Siebold* nor any other decision of this Court holds that a court may appoint an executive officer, much less one who is not accountable to the President. Nor have appellant and amici identified any other instance in which Congress has even attempted to transfer purely executive power, such as criminal law enforcement authority, to such an officer.

A. *Siebold* arose under an Act of Congress that authorized a federal court to appoint election supervisors to help preserve the integrity of congressional elections. Several state officials were convicted of violating a prohibition against interfering with the supervisors in the performance of their official duties. The defendants' principal contention in this Court was that Congress's power to regulate the election of Representatives (Art. I, § 4) did not permit it to displace state regulation only partially—*i.e.*, that Congress had to do so completely or not at all. Most of the Court's opinion (100 U.S. at 382-397) is devoted to rejecting that contention.

The defendants also argued that Congress could not constitutionally authorize judicial appointment of the election supervisors. In a brief discussion (100 U.S. at

Supp. IV) 2, 1812 (FDIC: removable by President for "reasons to be communicated by him to the Senate"); 12 U.S.C. 242 (Federal Reserve Board: removable for cause); 15 U.S.C. 41 (FTC: removable for inefficiency, neglect of duty, or malfeasance in office); 15 U.S.C. 78d(a) (SEC: no specified standard for removal).

397-398), the Court rejected that contention as well. The Court explained that it "is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such offices appertain" (*id.* at 397). But the Court said that there is "no absolute requirement to that effect" in the Appointments Clause and that "it would be difficult in many cases to determine to which department an office properly belonged" (*ibid.*). Accordingly, the Court stated that "the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress" (*id.* at 397-398), although it also stated that the principle of *Hennen*—that the Appointments Clause was intended to allow appointment by the Branch to which the official to be appointed "'most appropriately belonged'" (100 U.S. at 398 (citation omitted))—"express[ed] the law or rule by which [Congress's power to select the appointing authority] should be governed" (*ibid.*). Without endorsing the defendants' characterization of the election supervisors' duties as "entirely executive in character" (*id.* at 397), the Court sustained their appointments: it concluded that there was no "incongruity" in court appointment of the supervisors and that neither the President nor the head of a department would have been equally suited to the task (*ibid.*).

Siebold does not answer the Appointments Clause challenge to the independent counsel statute (or even address the basic Article II challenge). First, the decision has no bearing on the question whether an independent counsel can be an inferior officer, because the case involved no question of whether the election supervisors were inferior officers.[29] Second, on the question of judicial

[29] Because election supervisors had no guaranteed tenure (Rev. Stat. § 2012 (1873 ed.)), they were removable at will by, and hence were subordinate (and hence "inferior") to, the courts that appointed them. See *Hennen*, 38 U.S. (13 Pet.) at 259. Election supervisors also appear to have been subordinate to the chief supervisors in their jurisdictions. Rev. Stat. § 2026 (1873 ed.); see H.R. Rep. 218, 44th Cong., 2d Sess. 35-36, 42-45 (1877).

appointment of executive officers, the decision does not stand for the proposition that a federal prosecutor, such as an independent counsel, may be appointed by a court.

Siebold concerned borderline, hard-to-classify officers whose functions were held not incongruous with judicial appointment and were not uniquely within the province of the Executive Branch. The only duty of the election supervisors actually at issue in the case was quite limited: at the time the defendants interfered, the supervisors were entering the voting room at the beginning of the day to see if the ballot box was empty (100 U.S. at 378, 379). Even the duties of the supervisors that were not at issue (*e.g.*, checking voters against registration lists, securing ballot boxes, and reporting irregularities to the chief supervisor and Congress) were essentially investigative in nature and were both minimally intrusive and closely related to the task of protecting against election fraud. Since, as the Court explained, "it must be remembered that we are dealing only with the subject of election of representatives to Congress" (*id.* at 393), those functions could have been performed directly by Legislative Branch officers, pursuant to the power of each House to judge its own elections (Art. I, § 5, Cl. 1).[30] See *Buckley*, 424 U.S. at 137-138; *Barry* v. *United*

[30] We see no reason why all of the supervisors' functions described by amici (Walsh Br. 15; Sen. Br. 38; see generally Rev. Stat. §§ 2011-2029 (1873 ed.)), including the arrest of persons who impeded their functions, could not be performed by Legislative Branch officers, in the service of securing and judging congressional elections. See *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (Congress's Sergeants at Arms may arrest and imprison persons for contempt of Congress). In any event, the marshal or deputy marshals generally made the arrests, at the supervisors' instance (H.R. Rep. 218, *supra*, at 34-36 (supervisors' instructions)); the supervisors' power to arrest, cited by amicus Walsh (Br. 15), existed only "in the absence of the marshal's deputies, or if required to assist said deputies" (Act of Feb. 28, 1871, ch. 99, § 8, 16 Stat. 436; Rev. Stat. § 2022 (1873 ed.))—circumstances

States ex rel. Cunningham, 279 U.S. 597, 616 (1929). That Congress may, without incongruity, direct the courts to appoint officers to assist in the performance of a legislative function, especially one that is "judicial in character" (*id.* at 613), does not suggest that Congress may transfer from the Executive Branch to the courts the power to appoint purely executive officers who carry out the President's duties.

The analysis in *Buckley* underscores the distinction between *Siebold* and this case. The Court in *Buckley* applied the Appointments Clause by examining the functions of the Federal Election Commission, and it concluded that compliance with the Clause was simply irrelevant to the validity of any functions that Congress *could have* assigned to someone who was not appointed in accordance with the Clause. Of particular relevance here, the Court noted that Congress can engage in investigative and informational functions in aid of the legislative process and may compel the presence of witnesses to that end (424 U.S. at 138; *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927)), and it held that FEC Commissioners, while they could not exercise "discretionary powers to seek judicial relief," could perform investigative and informational functions (*id.* at 137-138). The election supervisors in *Siebold*, as we have explained, performed essentially similar functions.

To the extent that *Siebold*'s references to the absence of any "absolute" barriers and to congressional "discretion" suggest *unconstrained* discretion to vest the appointment of *any* inferior officer in *any* of the three appointing authorities named in the second portion of the Appointments Clause, the suggestion is incorrect (and would allow, *e.g.*, judicial appointment of military officers). But *Siebold*'s ambiguous words need not and should not be read to mean that Congress is subject to no limitations at all, and there are good reasons, even aside

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in which even private citizens are generally permitted to make or assist in an arrest (see Rev. Stat. § 2024 (1873 ed.); *Model Penal Code* § 3.07 (1985)).

from the narrowness of the facts of the case and the brevity of the Court's analysis, for not treating such dicta as disposing of the question of inter-Branch appointments. Notably, the government's brief did not address the appointment issue at all, and the portion of the defendants' brief devoted to that issue did not cite any of the materials that shed light on the Framers' intent beyond the text of the Clause itself (see Pet. Br. 85-86, *Ex parte Siebold*, *supra*). Given the evidence of purpose now before the Court and the intervening analysis in *Myers*, *Buckley*, *Chadha*, and *Synar*, the ambiguous dicta in *Siebold* do not support judicial appointment of an independent counsel.

B. The other materials cited by appellant and her amici offer no greater support for the independent counsel statute. Appellant relies (Br. 50) on "[c]itizen involvement in law enforcement." But aside from the obviously irrelevant examples of civil lawsuits brought under federal statutes by private citizens *on their own behalf* (*id.* at 50 & n.69), appellant cites only one even conceivably pertinent federal statute, 31 U.S.C. 3730(b), which authorizes a private party to bring a qui tam action on behalf of the United States. That provision, however, authorizes a private party to bring only a civil action for a money judgment (31 U.S.C. 3730(b)); responsibility for criminal prosecutions is committed to the Executive Branch (18 U.S.C. 287).[31] Furthermore,

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[31] There is no history in the federal system of qui tam criminal prosecutions. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943). *United States* v. *Trobe*, 28 F. Cas. 217 (D.C.W.D. Pa. 1865) (No. 16,541); *United States* v. *Malebran*, 26 F. Cas. 1145 (C.C.D.N.Y. 1820) (No. 15,711); Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. Rev. 778 (1973). Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973) ("in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"). Nor is it clear to what extent, if any, even the quite different English, colonial, and state systems have allowed criminal prosecutions to be fully controlled by private persons. See Note, *The History and Development of Qui Tam*, 1972 Wash. L.Q. 81.

the statute expressly permits the Executive Branch to take over any civil action at the outset (31 U.S.C. 3730 (b)(2); see also 31 U.S.C. 3730(b)(4)). See also 25 U.S.C. 201. In any event, the possible involvement of private parties in no way suggests that where law enforcement, particularly criminal prosecution, is undertaken by the federal government itself, Congress may ignore the separation of powers and assign that function to an officer who is appointed by a court and unaccountable to the President.

Equally misplaced is appellant's and amici's reliance (App't Br. 40-41; CC Br. 13-14) on the independence of the Attorney General in England, judicial appointment of prosecutors in some States, and the widespread pattern in the States of electing Attorneys General and prosecutors. Such arrangements shed no light on the allocation of appointing power or accountability to the President under the federal Constitution, which differs markedly from the constitutions of the various English, colonial, and state governments. See Seymour Br. App. 1a-2a, 4a. The Framers, of course, were well aware of these different structural approaches, including the differences in appointment power, and they deliberately departed from those approaches. See *The Federalist No. 47*, at 300-308 (Madison).

Consistent with the structure the Framers adopted, ever since the enactment of the Judiciary Act of 1789 (§ 35, 1 Stat. 92), United States Attorneys have been appointed by the President, with the advice and consent of the Senate, and have been subject to direction and removal by the President. In 1831, then-Attorney General Taney explained that the President's power to direct the "district attorneys" "is necessarily implied by the duties imposed upon him in that clause of the constitution before referred to, which enjoins him to take care that the laws be faithfully executed." *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 487.[32] To be sure, Con-

[32] Given the *President's* right of control, it is irrelevant for constitutional purposes whether district attorneys were afforded con-

gress has authorized district courts to fill a vacancy in the office of United States Attorney on an interim basis (28 U.S.C. 546, as amended by the Act of Nov. 10, 1986, Pub. L. No. 99-646, § 69, 100 Stat. 3616). But although that provision was upheld in *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963), this Court has not considered its validity; and even the *Solomon* court stressed that the appointment was temporary, the appointee was fully subject to control by the President, and the statute was not intended to displace the President's authority (*id.* at 842-843).

The fact that the Senate Committee's first draft of the Judiciary Act of 1789 proposed judicial appointment of the Attorney General and "district attorneys" (see App't Br. 41-42; CC Br. 14; Walsh Br. 16 n.15) cannot offer support for the independent counsel statute, as Judge Ginsburg pointed out in her dissent below (see J.S. App. 122a-123a n.41). That proposal did not even survive in the final Senate bill, and it was not enacted by Congress, which instead chose to provide for presidential appointment and Senate confirmation. Moreover, even under the rejected proposal, there is no indication that the Attorney General and district attorneys would have been insulated from presidential direction.

Nor does the independent counsel statute find any support in the provision in the Judiciary Act of 1789 for a court to "appoint" a disinterested person to serve writs in a suit in which the marshal or deputy marshal was a party (§ 28, 1 Stat. 87; see Walsh Br. 16 n.15). It is not clear that the person designated to serve the writ was expected to become an officer of the United States,

siderable independence as a practical matter and whether they were subject to the supervision of the Attorney General or of some other Executive Branch officer (see App't Br. 52-53). In fact, there was some supervision from the beginning. See L. White, *The Federalists: A Study in Administrative History* 406 (1948); Act of May 26, 1824, ch. 163, 4 Stat. 44. It is likewise irrelevant that the district attorneys, who were sworn in as officers, were "private lawyers who worked on the basis of fees for services rendered" (CC Br. 15 (footnote omitted)).

and the service of process is hardly a function that can be performed only by officers of the Executive Branch. See Fed. R. Civ. P. 4(c); cf. *Siebold*, 100 U.S. at 397.[33] United States Commissioners, also mentioned by appellant and amici (App't Br. 34; Walsh Br. 16-17), were merely the predecessors of United States Magistrates and hence were clearly judicial, not executive officers.[34] Finally, the

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[33] Judicial appointment of District of Columbia school board members (App't Br. 34 n.42, 40; H.R. Spkr. Br. 21 n.30) was upheld in *Hobson*, 265 F. Supp. at 914-915. But Congress has plenary legislative power over the District of Columbia (Art. I, § 8, Cl. 17), and its officers need not be appointed pursuant to the Appointments Clause. A similar plenary power over the territories (Art. IV, § 3, Cl. 2) was at issue in 6 Op. Att'y Gen. 80 (1853), relied upon by amicus Common Cause (Br. 15).

[34] In *United States v. Allred*, 155 U.S. 591, 595 (1895), the Court observed that Commissioners "have always been considered in the same light as masters in chancery and registers in bankruptcy, and subject to [judicial] supervision and control." See also *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931) (Commissioner is "a mere officer of the district court"). Among the duties ascribed to such Commissioners (see *Allred*, 155 U.S. at 594-595; *Rice* v. *Ames*, 180 U.S. 371, 377-378 (1901); *Go-Bart Importing Co.*, 282 U.S. at 353 n.2), only the power to "institute prosecutions," emphasized by amicus Walsh (at 16) suggests a prosecutorial power. But appellant and her amici have pointed to no instance of its use, and the statute from which the phrase comes, 8 U.S.C. (1934 ed.) 49; Rev. Stat. § 1982 (1873 ed.), is not fairly read to give Commissioners such power. The provision says that "district attorneys, marshals, and deputy marshals, the commissioners * * * with power to arrest, imprison, or bail offenders, and [other officers] * * * are authorized and required * * * to institute prosecutions against [specified persons] * * * and to cause such persons to be arrested, and imprisoned or bailed, for trial." Almost certainly, each person named in the first portion was to perform the obviously corresponding duty in the second portion—so that deputy marshals were not suddenly to have power to grant bail, and Commissioners were to perform only their usual duties of issuing arrest warrants and ordering imprisonment or bail. The succeeding section supports this reading. 8 U.S.C. (1934 ed.) 50; Rev. Stat. § 1983 (1873 ed.) (Commissioners are to exercise powers "conferred on them herein" "in like manner as they are authorized by law to exercise with regard to other offenses").

special prosecutors of Teapot Dome, the Truman Administration, and Watergate (CC Br. 15-17; Sen. Br. 27-28) were all appointed by the President or the Attorney General and were ultimately accountable to the President. It was, of course, precisely that relationship that the Ethics in Government Act sought to change.

V. THE INDEPENDENT COUNSEL STATUTE IS NOT CONSTITUTIONALLY JUSTIFIED BY CONGRESS'S DESIRE TO ELIMINATE SUPPOSED CONFLICTS OF INTEREST IN CERTAIN CRIMINAL INVESTIGATIONS AND PROSECUTIONS

Appellant and her amici seek to defend the independent counsel statute as necessary to eliminate supposed "conflicts of interest" that might arise if certain criminal investigations and prosecutions were left to officers accountable to the President. But no such argument of convenience can render constitutional an extra-constitutional legislative creation or "warrant a distortion of the Framers' work" (*Buckley*, 424 U.S. at 134). "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government" (*Chadha*, 462 U.S. at 944; see *Synar*, slip op. 20).[35]

A. Appellant contends (Br. 48-49) that this Court's decisions in *Nixon* v. *Administrator of General Services*,

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[35] Amicus Walsh argues (Br. 2-17) that the Necessary and Proper Clause (Art. I, § 8, Cl. 18) gives Congress the power to adopt the independent counsel statute as an appropriate response to the perceived problem. But that Clause adds nothing to the analysis. While Congress doubtless has broad power under that Clause to create offices and to structure the Executive Branch, the Clause does not allow Congress to adopt measures that violate other provisions of the Constitution. In *Buckley*, 424 U.S. at 134-135, this Court rejected a nearly identical argument. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Necessary and Proper Clause permits measures that "are not prohibited, but consistent with the letter and spirit of the constitution").

433 U.S. 425 (1977), and *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), call for a balancing approach, under which policy arguments in defense of the independent counsel statute might be considered. In appellant's view, a balancing approach is appropriate because the independent counsel statute does not result in aggrandizement of one Branch at the expense of another. Appellant is wrong. The statute divests the President and the Senate of their important roles in selecting and approving the appointment of executive officers who wield important governmental powers, and divests the President of his responsibility for certain criminal prosecutions, while it aggrandizes the Judicial Branch by vesting it with the executive power of appointment (and powers to define prosecutorial jurisdiction and to terminate the office). But even where such aggrandizement is absent, *Nixon* and *Schor* do not suggest resort to a balancing test if particular structural provisions of the Constitution are violated. Neither decision involved the Appointments Clause or removal authority; neither involved a congressional action whose aim was to transfer authority away from the Branch that is entrusted with it by the Constitution; and neither suggested that it is ever appropriate to consider Congress's policy reasons for a deliberate assault on another Branch's authority.

In *Nixon*, the Court rejected a facial challenge, based only on general separation-of-powers notions, to a statute that directed the Administrator of General Services to promulgate and apply regulations governing the disposition of presidential materials. As the Court emphasized, the statute assigned the duty to an "official of the Executive Branch, appointed by the President" (433 U.S. at 441; see also *id.* at 443), left the Executive Branch "in full control of the Presidential materials" (*id.* at 444), and preserved the President's power to assert any claims of privilege (*id.* at 444-445). There was no displacement of Article II authority.

Schor did not involve Article II and the Executive Branch at all, but rather the distinctive body of law governing Article III and the Judicial Branch. The Court upheld a statute that authorized the CFTC to rule in the first instance on certain counterclaims, because (1) the CFTC jurisdiction over the counterclaims was entirely voluntary with the parties (slip op. 13-15, 20); (2) it was not Congress's aim to withdraw the counterclaims from the cognizance of the Article III courts (slip op. 20); and (3) the courts retained quite broad power to review CFTC decisions (*id.* at 16-22). The Court, while considering congressional purposes, in no way suggested that if the underlying congressional aim had been to transfer authority away from the Judicial Branch or to deprive litigants of their right to present their claims to an Article III court, it would have been relevant to consider whether Congress might be able to articulate good reasons for such an assault on the constitutional structure. In this case, of course, Congress's express purpose was precisely to deprive the President of an important part of his Article II power, which in turn involuntarily subjects persons like appellees to investigations and prosecutions by a person outside the Article II structure.

B. Quite aside from the various structural impediments to application of a balancing test here, the conflict-of-interest concerns that appellant and her amici seek to weigh in the balance are addressed by the Constitution itself or may be addressed by Congress and the President pursuant to their powers, under the Necessary and Proper Clause and the Take Care Clause, to prescribe rules of conduct for executive officials.

1. To the extent that Congress was concerned about possible conflicts of interest of particular prosecutors, including any Department of Justice official up to and including the Attorney General, those problems may be fully addressed by statutes and regulations that require personal disqualification in particular matters, leaving them to be handled by other persons who are unaffected by a conflict. Congress has made it a crime in a broad class of situations for a federal prosecutor to participate substantially and personally in matters in which he has

a financial interest. 18 U.S.C. 208. Congress has also directed the Attorney General to promulgate regulations requiring disqualification of lawyers and others where a personal, financial, or political conflict, or its appearance, would otherwise result. 28 U.S.C. 528. The Department of Justice has done so. 28 C.F.R. Pt. 45; *Young*, slip op. 15-16. See also Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965 comp.) (federal employees may not have financial interests that conflict with their duties). Further and more stringent statutes on this subject could be adopted.

If Congress were to conclude that the Attorney General and the entire Department of Justice might be burdened by a conflict of interest in certain matters involving high-level executive officials, it could constitutionally establish a separate office within the Executive Branch and provide for presidential appointment, with consent of the Senate, of a person to fill that office. See Frey & Geller, *Better Than Independent Counsels*, The Washington Post, Feb. 14, 1988, at C7; H. Baker, *The Proposed Judicially Appointed Independent Office of Public Attorney: Some Constitutional Objections and an Alternative*, 29 Sw. L.J. 671, 682-683 (1975). Indeed, this and other possible measures would be available within the constitutional structure even if Congress believed at a particular time that every person then in the Executive Branch, except the President, suffered from a conflict of interest. It is only the President whose power and duties must be preserved under Article II.

2. The congressional concerns that underlie the independent counsel statute thus reduce, in the end, to a concern about the President himself. The independent counsel statute rests on Congress's belief that, in certain cases, there is a "fundamental institutional conflict of interest" in having the President remain accountable for a criminal investigation and prosecution (H.R. Rep. 95-1307, *supra*, at 2). But as that statement betrays, and as the Senate Committee later stated explicitly, that conflict is "inherent in our system of government" (S. Rep. 97-496, *supra*, at 4). In this respect, it is like the con-

flict inherent in the courts' deciding cases affecting judges' pay (see *United States* v. *Will*, 449 U.S. 200, 214 (1980); *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978)) and in Congress's deciding whether particular laws will apply to it. It is not for Congress, outside the Article V amendment process, to decide that the structure established by the Framers is defective and to assume to cure the defect.

Such attempts to improve upon the Constitution are especially unwarranted where, as here, they concern a problem the Framers specifically addressed. The Framers comprehensively considered the conflicts of interest that might result from occupying various offices under the new Government, and the Constitution contains numerous provisions that address the subject. *E.g.*, Art. I, § 6 (no Senator or Representative may be appointed to civil office that was created or the emoluments of which were increased during the time for which he was elected; no person holding any office under the United States shall be a Member of either House); *id.* § 9, Cl. 8 (no person holding public office may accept foreign gifts, emoluments, offices, or titles without congressional consent); Art. II, § 1, Cl. 2 (no Senator or Representative or person holding office may be an elector); *id.* § 1, Cl. 7 (President's salary not to be increased or decreased during time for which he is elected and President may not receive other emoluments from the United States or any State). The Framers did not, however, include a provision requiring the disqualification of the President from exercising his broad powers under Article II in these or any other circumstances.[38] Moreover, the

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[38] Notably, in the Convention, Edmund Randolph proposed to exclude "cases of treason" from the pardon power, arguing: "The President may himself be guilty. The Traytors may be his own instruments." 2 *Farrand* 626. Other members of the Convention, including George Mason and James Madison, shared the concern (*id.* at 626-627), but it was objected that if the President "be himself a party to the guilt he can be impeached and prosecuted" (*id.* at 626 (James Wilson)). See *The Federalist No. 74*, at 449 (Hamilton); 4 *Elliot's Debates* 111-112 (James Iredell); 2 *id.* at

Constitution's provision for the advice and consent of the Senate was designed to furnish precisely the sort of check on "any incautions or corrupt nomination by the Executive" (2 *Farrand* 43 (Madison)) or the appointment of "obsequious instruments of his pleasure" (*The Federalist No. 76*, at 458 (Hamilton)) that Congress sought to provide by vesting appointment of the independent counsel in a court. The Constitution therefore fully accommodates Congress's concern with ensuring the appointment of a prosecutor having the requisite qualities of integrity, fairness, and determination.

3. Most important, the Constitution provides for impeachment (Art. II, § 4) specifically to deal with abuses of power by the President and other officers, and the Framers quite deliberately chose to vest the high responsibility of impeachment in bodies that themselves are politically accountable to the people (Art. I, § 2, Cl. 5 (House has the sole power to impeach); *id.* §3, Cl. 6 (Senate has the sole power to try impeachments)). See *The Federalist No. 65*, at 396-401 (Hamilton); *id.* at 397 (in this "NATIONAL INQUEST into the conduct of public men[]," "who can so properly be the inquisitors for the nation as the representatives of the nation themselves?"); 4 *Elliot's Debates* 114 (James Iredell). The Framers understood that impeachment was a remedy of real substance.[37] The role they expected that mechanism to play is demonstrated by the express exemption of impeachment from the President's otherwise plenary pardon power. Art. II, § 2, Cl. 1. The

497-498 (Mason and Madison). The Framers rejected the exception, despite the "conflict of interest," and relied on impeachment as a remedy. There is no greater constitutional justification for an independent counsel than for an independent pardon authority.

[37] See *The Federalist No. 65*, at 396-401 (Hamilton); *Id. No. 69*, at 416 (Hamilton); *Id. No. 77*, at 464 (Hamilton); *Id. No. 81*, at 485 (Hamilton); *Id. No. 84*, at 511 (Hamilton); 2 *Farrand* 67-69; *Story* 282-290; P. Hoffer & N. Hull, *Impeachment in America, 1635-1805*, at 96-106 (1984); *id.* at 146 ("By 1975, impeachment had proved itself an effective and a fair tool of republican government.").

Framers adopted this exemption specifically to insure against presidential protection of "high officers of state" (4 *Elliot's Debates* 113)—who, once removed, could still be prosecuted "in the ordinary course of law" (see *The Federalist No. 65*, at 399 (Hamilton)). Justice Story explained (*Story* 551) that the exemption from the pardon power "takes from the President every temptation to abuse it in cases of political and official offenses by persons in the public service." The exemption was designed as a "check upon his power, so that he cannot by any corrupt coalition with favourites, or dependents in high offices, screen them from punishment."

The independent counsel statute seeks to bypass the impeachment process that the Framers designed to guarantee both that high officers of government could be investigated and removed from office and that the President, himself subject to impeachment, could be prevented from protecting his "favourites, or dependents in high offices." The Framers assigned the impeachment mechanism to Congress because they wanted the responsibility of dealing with high government misconduct to rest in a politically accountable assembly. Just as the President may not be divested of or avoid his responsibilities under the Take Care Clause, Congress may not avoid its often difficult, but no less crucial, duty of overseeing the Executive Branch through the means the Constitution provides for that task.

4. Of course, less drastic tools than impeachment are available under the Constitution. Ever since 1789, those tools have been used with great frequency. The regular prosecutorial organs of the Department of Justice may be, and have been, used to prosecute high ranking officials. See *United States* v. *Agnew*, 428 F. Supp. 1293 (D. Md. 1977).[38] Congress may create or provide for the

[38] See also *Connelly* v. *United States*, 249 F.2d 576 (8th Cir. 1957), cert. denied, 356 U.S. 921 (1958) (Assistant Attorney General and Appointments Secretary under President Truman); *Miller* v. *United States*, 24 F.2d 353 (2d Cir.), cert. denied, 276 U.S. 638 (1928) (Attorney General under Presidents Harding and Cool-

creation of permanent watchdog offices like the Inspector General Offices (5 U.S.C. (& Supp. IV) App. at 987-993) or the Office of Professional Responsibility of the Justice Department (28 C.F.R. 0.39). It may establish an agency of government to address official misconduct or create a separate unit within an existing department, like the Public Integrity Section in the Justice Department's Criminal Division. It may create special prosecutor offices, or authorize their administrative creation, on a case-by-case basis.[39] These approaches have hardly proved useless: through such normal mechanisms and through the statutory or regulatory creation of special prosecutors, high-level executive officers serving under Presidents Jefferson, Grant, Hayes, Theodore Roosevelt, Harding, Coolidge, Truman, and Nixon were prosecuted, and many others have been investigated. See generally *Responses of the Presidents to Charges of Misconduct* (C. Vann Woodward ed. 1974). Congress also has broad powers to conduct its own investigations short of impeachment, as it did, for example, in the Watergate and Iran/Contra hearings. See *McGrain* v. *Daugherty*, *supra* (investigation of Attorney General's failure to prosecute

idge); *United States* v. *Babcock*, 24 F. Cas. 913 (C.C.E.D. Mo. 1876) (No. 14,487) (President Grant's personal secretary); *United States* v. *Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693) (Vice President, 1801-1805, prosecuted by district attorney).

[39] Pursuant to statute, President Coolidge appointed a special prosecutor, with Senate consent, to investigate wrongdoing in connection with the Teapot Dome leases. Act of Feb. 8, 1924, ch. 16, 43 Stat. 5-6. A special prosecutor's office was created within the Justice Department in the Nixon Administration. *United States* v. *Nixon*, *supra*. The Attorney General appointed an independent counsel in 1979 to investigate the relationship between the Carter Warehouse and the National Bank of Georgia. 44 Fed. Reg. 25837 (1979). All of the current independent counsels have been offered, and several have accepted, appointments as special prosecutors within the Department of Justice. See also *Jones* v. *United States*, 179 F. 584, 586-590 (9th Cir. 1910) (special prosecutor appointed by Attorney General); *Tyner* v. *United States*, 23 App. D.C. 324, 363 (D.C. Cir. 1904) (special prosecutor appointed by President Roosevelt).

alleged corruption).[40] And Congress has numerous means of applying political pressure to help secure the President's faithful execution of the laws. There is no warrant after 200 years of experience under the Constitution for the independent counsel statute's extra-constitutional means of addressing a problem that the Constitution itself furnishes ample means to address, through properly accountable institutions of government.

[40] See, *e.g.*, *Hearings on the Investigation of Regulatory Commissions and Agencies Before the Special Comm. on Legislative Oversight of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 525, 1384-1389 (1958) (Sherman Adams, under President Eisenhower); S. Rep. 27, 69th Cong., 1st Sess. (1926) (Sec'y of Treasury Mellon, under President Coolidge); H.R. Rep. 3142, 49th Cong., 1st Sess. (1886) (Attorney General Garland, under President Cleveland); H.R. Rep. 186, 44th Cong., 1st Sess. (1876) (Sec'y of War Belknap, under President Grant); H.R. Rep. 684, 29th Cong., 1st Sess. (1846) (Sec'y of State Webster, under President Tyler); 3 Annals of Cong. 963 (1793) (Sec'y of State Hamilton, under President Washington); *Responses of the Presidents to Charges of Misconduct*, *supra*. See also S. Rep. 96-1015, 96th Cong., 2d Sess. (1980) (Billy Carter, brother of President).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1988

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 202037 60383

No. 87-1279

FILED
MAR 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT,

v.

THEODORE B. OLSON, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SPEAKER AND LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES, AMICI CURIAE

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In the Supreme Court of the United States

No. 87-1279

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT

v.

THEODORE B. OLSON, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SPEAKER AND LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES, AMICI CURIAE

A divided panel of the court of appeals struck down Title VI of the Ethics in Government Act, 28 U.S.C. §§ 591-598 ("the Ethics Act"), which establishes the office and duties of independent counsels, as unconstitutional. In an investigation by Independent Counsel Alexia Morrison a grand jury subpoenaed three former senior officials of the Department of Justice—Theodore B. Olson, Edward C. Schmults, and Carol E. Dinkins ("the challengers"). They refused to obey the subpoenas, disobeyed a court order to comply with the subpoenas, and were held in civil contempt. At each juncture, they asked the courts to strike down this Act of Congress. The Speaker and Leadership Group of the U.S. House of Representatives ("House Amici")[1] appear in this case as *amici curiae* to

[1] The Speaker and Leadership Group consist in this case of the Honorable Jim Wright, Speaker of the House of Representatives; the Honorable Thomas S. Foley, Majority Leader; and the Honorable Tony Coelho, Majority Whip.

defend the statute, while the Department of Justice joins in the challenge (and is a "challenger").[2] House *Amici* join in the jurisdictional statement and the statement of the case by appellant Morrison.

SUMMARY OF ARGUMENT

The challengers assail the Ethics Act on three grounds: generalized notions of separation of powers, the Appointments Clause, and the "Faithful Execution" Clause. In their separation of powers challenge, they invoke as precedents cases prohibiting statutes providing for legislative appointment, legislative veto, and legislative removal. However, the Ethics Act contrasts sharply with these, for independent counsels are plainly and completely independent from Congress. Like *Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245, 3261 (1986), "this case raises no question of the aggrandizement of Congressional power at the expense of a coordinate branch." In a case like this, the Court considers three factors: legislative purpose, the degree of intrusion into executive functioning, and whether the executive function is "core." *See Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245 (1986).

Congress spent five years after Watergate devising a constitutional response to the problem of conflict of interest in investigations of high government officials.[3] It is "clear that Congress did not provide for a substantive intrusion by independent counsel into the Executive Department." *In re Olson*, 818 F.2d 34, 46 (D.C. Cir. Indep. Couns. Div. 1987). The Ethics Act preserves for the Attorney General a vast array of powers, including his unreviewable discretion as to whether to invoke the statute and his authority to fire the independent counsel.

Centralized control by the Attorney General of all aspects of prosecution is not a "core" function. Courts routinely appoint officers with executive functions, from temporary United States Attorneys to prosecutors of criminal contempt cases. *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987). The manner in which the First Congress placed the "core" functions of military and diplomatic activity under centralized Executive control, as contrasted with the dispersed control of prosecution, shows how the Framers saw only the former as *bona fide* core functions.

The challengers contend further that by vesting appointments of independent counsels in a court, the Ethics Act violates both the Appointments Clause, art. II, § 2, cl. 2, and art. III. The Appointments Clause states that "the Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, *in the Courts of Law*, or in the Heads of Departments." (Emphasis supplied.) An independent counsel performs a circumscribed, limited-term job, making her an "inferior officer."

The Framers were familiar with court-appointed prosecutors. For example, in 1789, the Special Judiciary Committee of the First Senate, preparing the first Judiciary bill, proposed that "each District Court shall appoint a meet Person learned in the Law to Act as Attorney for

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[2] Participation by the Speaker and Leadership Group is the standard mechanism by which the House of Representatives pursues its institutional interests in litigation. *See, e.g., Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *Japan Whaling Association v. American Cetacean Society*, 106 S. Ct. 2860 (1986); and, *Webster v. Sun Co., Inc.*, 731 F.2d 1 (D.C. Cir. 1984).

In light of the institutional nature of this participation and the status of the House of Representatives in the government of the United States, it would appear appropriate for the Speaker and elected leaderhip of the House of Representatives to avail themselves of the right to submit a brief as *amici curiae* without the consent of the parties, in accordance with the provisions of Sup. Ct. R. 36.4. In this instance a written consent has, nonetheless, been obtained and copies of the consent letters have been filed with the Clerk of the Court.

[3] "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

the United States in such District." [4] *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1879), resolved any remaining doubts about the propriety of appointments of executive officials by the Judiciary.[5] In that definitive case, the Court upheld judicial appointments to an executive office, that of election supervisor. *Siebold* held there was "no absolute requirement" to "vest the appointment of inferior officers in that department of the government, executive or judicial . . . to which the duties of such officers appertain." 100 U.S. at 397. Rather, between the President and the "courts of law," *Siebold* held that "as the Constitution stands," the choice "is a matter resting in the discretion of Congress." *Id.* at 397-98. Once Congress chooses, "the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts." *Id.* at 398.

Finally, the challengers invoke the "Faithful Execution" Clause, complaining that the Attorney General cannot protect them, since he does not control the independent counsel and cannot remove her for less than "good cause".[6] However, "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (quoting Holmes, J.) "The clause was intended to

[4] First Congress Legislative History Project, 5 *Legislative Histories* 1172-94 (Senate Bill 1 as reported to the Senate by Committee member, Senator Richard Henry Lee of Virginia on June 12, 1789).

[5] In fact, the federal courts already have the recognized and judicially approved power to appoint temporary United States Attorneys and other officials whose duties consist in whole or in part of law enforcement.

[6] With respect to the particular question of the "for cause" restriction on the Attorney General's power to remove the Independent Counsel, as to inferior officers, the "constitutional authority in Congress to vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to officers so appointed." *United States v. Perkins*, 116 U.S. 483, 485 (1886). *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958).

rule cut any power for [the President] to dispense with, or suspend, the execution of the laws." [7]

In sum, the Ethics Act implements a vital national purpose arising from the Watergate experience. It complies with the Appointments Clause's language and the "Faithful Execution" Clause's intent. The Court should uphold this Act of Congress.

ARGUMENT

I. INDEPENDENT COUNSELS COMPORT WITH THE SEPARATION OF POWERS

The challengers ask the Court to strike down this Act of Congress as violative of the principle of separation of powers, "part of 'our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.'" Slip op. at 25 (quoting *United States v. United States District Court*, 407 U.S. 297, 317 (1972)). In charging the Ethics Act with violating that principle, the challengers rely upon a line of cases which simply does not apply to the Ethics Act. Specifically, they depend heavily on three cases regarding statutes with which Congress itself sought the authority of another Branch. *Buckley v. Valeo*, 424 U.S. 1 (1976), concerned a statute authorizing Congress itself to appoint commissioners of the Federal Election Commission. *INS v. Chadha*, 462 U.S. 919 (1983), similarly concerned a statute authorizing Congress itself to operate a "legislative veto" regarding deportations. Most recently, *Bowsher v. Synar*, 106 U.S. 3181 (1986), concerned a statute authorizing the Comptroller General, who Congress itself may remove, to direct budget cutbacks.

These cases serve, not to show a fault in the Ethics Act, but to demonstrate how the Act properly accords with the principles of separation of powers, and checks and balances. In those three cases, the Court stressed that when Congress itself takes another Branch's power, it upsets

[7] Slip op. at 14 n.19 (dissenting opinion) (quotation omitted).

the system of checks and balances.[8] These cases "cluste[r] around the concept of aggrandizing one branch at the expense of another," slip op. at 2 (Ginsburg, Ruth Bader, J., dissenting).

The Ethics Act contrasts sharply with the statutes in *Buckley*, *Chadha*, and *Bowsher*, and adheres to the separation of powers, because Congress does not take any authority for itself. Independent counsels are plainly and completely independent from Congress. Unlike *Buckley*, Congress does not appoint independent counsels; unlike *Chadha*, Congress does not veto the acts of independent counsels; and unlike *Bowsher*, Congress does not remove independent counsels. Even the divided panel below admitted that "Congress' role under the Act is limited to a non-binding call for the appointment of an independent counsel and the right to receive reports from that office." Slip op. at 66. Otherwise, apart from oversight functions, after Congress enacted the statute, its role ended.[9] Then the matter became the sole concern of the Executive and the Judiciary, the two Branches involved in the workings of the statute, not Congress itself.[10]

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[8] In *Buckley*, the Court sustained the challengers' argument that "Congress is precluded under the principle of separation of powers from vesting in itself the authority to appoint those will exercise such authority." 424 U.S. at 118. The *Chadha* opinion emphasized that "[t]he hydraulic pressure inherent within each of the separate Branches," including Congress, "to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." 462 U.S. at 951. Finally, in *Bowsher*, the Court held that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws," and "Congress cannot grant to an officer under its control what it does not possess." 106 S. Ct. at 3188.

[9] Neither section 595(e), which allows certain members of Congress to request that the Attorney General apply for appointment of an independent counsel, nor section 596(a)(2), requiring that the Attorney General report to Congress regarding any removal of an independent counsel, goes beyond long-established oversight authority. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

[10] The divided panel below attempted to analogize this statute to those in *Chadha* and *Bowsher* by arguing that "[i]f the President's au-

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This Court has laid down a pertinent line of cases regarding the separation of powers, offering correct standards for testing statutes or rules implementing legislative purposes without aggrandizing Congress itself. These cases include *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) ("*Nixon*"); *Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245 (1986) ("*Schor*"); and *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987) ("*Vuitton*"). In *Schor*, decided the same day as *Bowsher v. Synar*, this Court drew the distinction between cases like *Bowsher* and *Chadha*, on the one hand, and cases like *Schor* on the other:

> Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch.

106 S. Ct. at 3261.

To determine "whether Congress impermissibly undermined, without appreciable expansion of its own power,

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thority is diminished . . . . Congress' political power must necessarily increase vis-a-vis the President"; it called the statute a "flicking left jab, confound[ing] the Executive Branch in dealing with Congress." Slip op. at 67. This vague "left jab" theory proves too much. Any statute taking functions currently in a Cabinet department and shifting them to an independent regulatory commission or agency (or, if the functions are adjudicative, to a court), would be said by some to "diminish" the President's authority, just as, in that sense, any appropriation limitations or legislated sunshine requirements or treaty reservations would. Yet this Court has never adopted a test which demands that every enactment feed the Executive Branch's power, lest it complain of the law's "left jab." That kind of approach would straitjacket the govenment's ability to respond as necessary to new problems or to the lessons of experience, and would make the courts servants of an ever-growing Executive. Even Presidents do not take that approach, despite the greater likehood that they, rather than this Court, will be bent on adding to executive power. The Ethics Act was enacted in 1978, reauthorized in 1983, and again reauthorized in 1987, every time with the signature of the President.

the role of [another] Branch," *id.*, this Court applies a flexible test.[11] The test calls for consideration in this case of three main factors: the statute's legislative purpose,[12] the extent of its intrusion into the Executive function,[13] and the extent to which the function it affects is a "core" function.[14]

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[11] This Court has consistently emphasized that a "hermetic sealing off of the three branches of Government from one another" is not necessary and would, in fact, "preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). As Justice Jackson put it in an oft-quoted passage, "the Constitution diffuses power the better to secure liberty," but it also contemplated that "practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion). The Constitution requires "interdependence" and "reciprocity" as well as "separateness" and "autonomy." *Id.*

The cases of the last decade have categorically rejected the "archaic view" reflected in the opinion of the divided panel below that separation of powers mandates "three airtight departments of government." *Nixon*, 433 U.S. at 443. A crucial inquiry is whether the challenged legislation "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* In answering that question, it is both appropriate and necessary to consider "common sense." *Buckley v. Valeo*, 424 U.S. at 1, 122 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)); *see also INS v. Chadha*, 463 U.S. at 962 (Powell, J., concurring).

[12] *Schor*, 106 S. Ct. at 3258 ("the concerns that drove Congress"); *Nixon*, 433 U.S. at 443 (how much there is "need to promote objectives within the constitutional authority of Congress"); slip op. at 17 (dissenting opinion) ("the purposes of the legislation").

This factor should not be confused with a plea of necessity (regardless of constitutionality). Rather, this Court considers legislative purpose in cases which do not involve Congressional self-aggrandizement because it is obviously easier to determine whether the statute does impermissible harm if it is known why the statute is there at all.

[13] *Schor*, 106 S. Ct. at 3258 ("the extent to which the [non-Executive body] exercises the range of jurisdiction and powers normally vested only in [the Executive]"); *Nixon*, 433 U.S. at 443 ("the extent to which [the statute] prevents the Executive Branch" from proceeding); slip op. at 17 (dissenting opinion) ("the extent of the removal").

[14] *Schor*, 106 S. Ct. at 3258 ("the extent to which the essential attributes of [Executive] power are reserved" to it); *Nixon*, 433 U.S. at

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Applying that test to this statute, first, the statute aims at a legislative purpose consistent with the system of checks and balances. Congress enacted the statute as a considered response to the nation's experience with the Watergate scandal. A central aspect of that scandal had been the influence of White House staff and political appointees in the Justice Department over the Department's investigations of those same high officials. The Senate Watergate Committee found that the Watergate history "raises a serious question as to whether high Department of Justice officials can effectively administer criminal justice where White House personnel, or the President himself, are the subjects of the investigation." *The Final Report of the Senate Select Comm. on Presidential Campaign Activities*, 93rd Cong., 2d Sess. 80 (1974).[15]

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443 ("the extent to which [the statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions"); slip op. at 17 (dissenting opinion) ("whether the limitation affects a core executive function").

[15] Specifically, Congress found that in 1972 immediately after the Watergate break-in, John Dean, Counsel to the President, "arranged with Assistant Attorney General [Henry] Petersen to have [the White House staff's] depositions taken outside the presence of the Grand Jury"; through close contacts, "Dean was able to anticipate the leads the FBI would follow and coach those persons who had knowledge of the facts within [the Committee to Re-elect the President] and the White House." *Impeachment of Richard M. Nixon*: H.R. Rep. No. 1305, 93d Cong., 2d Sess. 57 (1974). As the investigation progressed, "the President continued his series of meetings and telephone calls with Petersen," *id.* at 113, which served as a conduit for information from inside the investigation to the potential targets of investigation. Effectively, Dean and the President prevented an independent investigation of the White House from even starting.

After media and court-compelled disclosures, public pressure led the Attorney General to appoint a non-statutory Special Prosecutor, Archibald Cox. Ultimately, that Special Prosecutor declined to accept President Nixon's orders "to agree to [his] proposal [regarding access to tapes] and to desist from issuing subpoenas for tapes and documents." *Id.* at 124. In response, in the "Saturday Night Massacre," President Nixon ordered Attorney General Elliott Richardson to fire Cox, the Attorney General resigned in protest, the Deputy Attorney General was fired, and the Solicitor General then fired Cox.

Accordingly, the committee recommended the creation of some kind of independent officer or agency to handle allegations of high-level misconduct. *Id.* at 96–100.

Over the following five years, the proposals for such a measure received thorough study. Congress paid close attention to the constitutional implications, taking extensive testimony from legal experts.[16] It took into account the historic national need for special prosecutors, and the recurring problems with non-statutory ones, particularly as reflected by experiences during the Grant, Harding, and Truman administrations. S. Rep. No. 170, 95th Cong., 1st Sess. 2 (1977). Numerous well-known legal scholars, such as Professors Paul Bator, Paul Freund, and Raoul Berger of Harvard University, and Professors Philip B. Kurland and Gerhard Casper of the University of Chicago testified as to the legislation's constitutionality. Similarly supportive testimony was received from the American Bar Association and from the Deans of 49 law schools, including Harvard, Yale, Chicago, Pennsylvania, Stanford, Columbia, Michigan, Wisconsin, Berkeley, Vanderbilt, Howard, and Georgetown.[17]

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[16] Over a period of about five years from the 93rd Congress until the 95th, the Legislature held lengthy hearings every year. *See, e.g., Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. (1973); *Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. (1974); *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 3036 Before the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. (1975-76); *Provision for Special Prosecutor: Hearings on H.R. 14476 et al. Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976); *Special Prosecutor Legislation: Hearings on H.R. 2835 and Related Bills Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977); *Public Officials Integrity Act of 1977: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. (1977).

[17] *Special Prosecutor: Hearings*, *supra* note 16, at 351–52 (Part II).

Former Watergate Special Prosecutor Archibald Cox, testifying from familiarity with the problem, strongly supported the legislation. He explained that:

> [t]he pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy with about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.

Removing Politics From the Administration of Justice, *supra* note 16, at 200.

As the bill neared enactment in 1978, the Department of Justice endorsed it. The Justice Department's representative testified before Congress that he "support[s] this legislation, and the Attorney General supports this legislation, and the President of the United States supports it." [18] He then addressed the constitutional issues raised, foreshadowing the precise challenges made now, and explained why the Department of Justice then correctly considered them all in error:

> The Department has no objections to the manner in which the appointment process is initiated, the method of judicial appointment, or the restrictions placed on the Executive's power of removal over the special prosecutor . . . . We believe that judicial appointment is justified by the Appointments Clause, Article II, section 2, and the extraordinary circumstances which would mandate a recourse to a special prosecutor . . . [We] do not believe that an "incongruous" duty would be imposed upon the courts. *See Ex Parte Siebold*, 100 U.S. 371, 398 (1879).
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> The extraordinary circumstances inherent in the need for resort to a special prosecutor would also justify the restrictions placed on the Executive's power of removal . . . [Supreme Court] decisions

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[18] *Public Officials Integrity Act of 1977: Hearings*, *supra* note 16 at 8 (testimony of John M. Harmon, Acting Assistant Attorney General of the Office of Legal Counsel, U.S. Department of Justice).

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> have narrowed [the discretionary removal] principle to allow for limitations to be placed with respect to those whose quasi-legislative or quasi-judicial duties require a degree of independence from the Executive. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958) . . . [O]n balance, we think that the extraordinary circumstances which would warrant a resort to a special prosecutor would also justify granting him the measure of independence provided . . . .

Id. at 15-17. Based on overwhelming evidence of both constitutional legitimacy and suitability of the means to the legislative purpose, Congress passed the Ethics Act in 1978.

Since enactment, the statute has been re-endorsed twice through reauthorizations in 1983 and 1987. Pub. L. No. 97-40, 96 Stat. 2039 (1983); Pub. L. No. 100-191, 101 Stat. 1293 (1987). On all three occasions of enactment (1978, 1983, and 1987), the President signed the bills into law, contrasting markedly with bills on which the President invoked his veto power to avert alleged constitutional intrusions.[19] A significant factor in reauthorization was Congress's careful consideration of the constitutional issues.[20]

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[19] *See, e.g.*, S. Jour., 233, 23rd Cong., 2d Sess. (1835) (President Jackson vetoes foreign claims settlement bill on constitutional grounds); 119 Cong. Rec. 16194 (1973) (veto on constitutional grounds of a bill altering office of the Director and Deputy Director of the Office of Management and Budget); 22 Weekly Comp. Pres. Doc. 1568 (1986) (veto on constitutional grounds of bill establishing a new council in the Executive Office of the President).

[20] For example, in 1981-82, a Senate committee conducted an extensive investigation of the operation of the law. *Ethics in Government Act Amendments of 1982*: S. Rep. No. 496, 97th Cong., 2d Sess. 3-4, 4-6 (1982) (describing 1981 investigation by subcommittee, and explaining why "[t]he Committee believes that the dangers of conflict of interest [addressed by the statute] were not unique to Watergate, but rather are inherent in our system of government"); *Independent Counsel Amendments Act of 1987*: H.R. Rep. No. 316, 100th Cong., 1st Sess. 20-24 (1987), cited *infra*.

As the House Committee on the Judiciary discussed in its 1987 report on the statute, "on eight occasions . . . appointments [of independent counsels] have been made a matter of public record," *Independent Counsel Amendments Act of 1987: H.R. Rep. No. 316, 100th Cong., 1st Sess.* 14 (1987):[21] for Hamilton Jordan, Timothy E. Kraft, Raymond J. Donovan, Edwin A. Meese III, Theodore B. Olson, Michael K. Deaver, "Iran/Contra," and Franklyn C. Nofziger. *Id.* at 14-19. The report reflects not only how the statute has averted the substance or appearance of conflict of interest in investigation of high government officials, but also how the statute benefitted the individuals under investigation. An independent investigation provided them with the opportunity for credible exoneration on the charges investigated, rather than recurring suspicion of improper influence, when decisions were made not to prosecute.[22] In sum, the legislation responded to both historical and recent experience, employed means tailored to the support of the system of checks and balances, reflected careful constitutional study, and even received the constitutional blessing on all issues of the Branch affected.

The second factor weighed by the *Schor-Nixon-Vuitton* line of cases concerns the "extent of the intrusion" on the Branch in question. Challengers of the Ethics Act contend that it cuts into the Attorney General's powers since the courts (in particular, the Independent Counsel Division of the United States Court of Appeals for the District of Columbia) (or "Special Division") appoint the Independent Counsel, and since the Attorney General can remove her only for "good cause." The individual chal-

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[21] There has additionally been an independent counsel who resolved a tax matter concerning a Department of Justice official, which has received press attention although it has not officially been made public.

[22] For example, the 1984 investigation of Edwin A. Meese III, then Counselor to the President, which concluded that there was no basis for prosecution, *see* H.R. Rep. No. 100-316, *supra*, paved the way for his confirmation as Attorney General.

lengers complain that the asserted usurpation of the Attorney General's authority subjects them to overzealous prosecution.[23] While the appointment and removal provisions raise particular constitutional issues addressed in Parts II and III below, they receive consideration as part of this factor in the separation of powers challenge.

However, the suggested intrusive transfer of all power away from the Attorney General simply does not take place. Congress preserved for the Attorney General an array of powers limiting the intrusion of the Ethics Act. The Attorney General possesses unreviewable discretion regarding when to invoke—and when not to invoke—the statute. As the 1987 conference reported noted, "the conferees agree that no judicial review is available of decisions by the Attorney General not to conduct preliminary investigations". *Independent Counsel Reauthorization Act of 1987*, H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987). Mr. Schmults and Ms. Dinkins are prime examples. Because the Attorney General decided, in his unreviewable discretion, against their prosecution, the Special Division refused to grant the Independent Counsel's request to change the "current order [which] grants the Independent Counsel jurisdiction to *prosecute* only Olson." *In re Olson*, 818 F.2d 34, 48 (D.C. Cir. Indep. Couns. Div. 1987) (emphasis in original). Hence, Mr. Schmults and Ms. Dinkins can complain only of being the subjects of investigation, not prosecution.

The Attorney General's demonstrated power to create, to shape, and hence to restrict the jurisdiction of an Independent Counsel serves as only one item on an imposing list of powers vested in the Attorney General. As the Special Division noted of the Attorney General:

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[23] As the divided panel contended: "In effect, an entire self-sufficient government agency is created from scratch to investigate and perhaps prosecute a single individual. The need to justify even the expense of an office dedicated solely to one goal must generate a reluctance to decide against indictment . . . ." Slip op. at 70-71. Of course, most Independent Counsels have not indicted anyone.

(a) [He] conducts the investigation and determines whether the information is sufficient [to proceed] . . . .

(b) [He] also determines whether the investigation of other persons [by the Justice Department] . . may result in a . . . conflict of interest.

(c) . . . [H]e has discretion to conduct "such preliminary investigation of the matter as [he] . . . deems appropriate."

(d) If [he] . . . finds there are no reasonable grounds to believe that further investigation or prosecution is warranted, he notifies the Division of the Court and his decision is final. Thereafter the Division of the Court shall have "*no power to appoint an independent counsel.*"

(e) . . . [It is he who] applies to the Division of the Court for the appointment of an independent counsel.

(f) . . . [Even if at first he decides not to apply,] he may still, on the basis of additional information, apply [later] for appointment of an independent counsel.

(g) [His application gives him] the power to suggest . . . the nature and extent of the jurisdiction that should be set forth in the Division's order.

(h) [He] may request the independent counsel to accept referral of a [related] matter.

(i) [His determination to apply] for the appointment of an independent counsel *is not reviewable in any court.*

(j) [He] may request the Division of the Court to disclose the identity and prosecutorial jurisdication of such independent counsel . . . .

(k) [He may request the Special Division] to expand the prosecutorial jurisdiction of an existing independent counsel.

(l) Upon showing of good cause by the Attorney General, the Division of the Court may grant an extension of the preliminary investigation . . . .

(m) [His] authority . . . [over] those [electronic interception] matters that specifically require [his] personal action . . . is not affected.

(n) The Department of Justice has discretion to assist the independent counsel at his request.

(o) [He] may, at the request of the independent counsel, refer a [related] matter. . . .

(p) An independent counsel . . . is required to comply with the . . . policies of the Department of Justice . . . .

(q) An independent counsel may dismiss matters . . . prior to prosecution only upon compliance with the . . . policies of the Department of Justice . . . .

(r) The majority and minority members of the Judiciary Committees of Congress separately may request in writing that the Attorney General apply for the appointment of an independent counsel . . . .

(s) The Attorney General may by "personal action" remove from office an independent counsel [for good cause] . . . .

(t) The Division of the Court upon suggestion of the Attorney General may terminate an office of independent counsel at any time . . . .

(u) . . . [A]n independent counsel . . . may agree in writing that such investigation or proceedings may be continued by the Department of Justice.

(v) The Attorney General or the Solicitor General may make a presentation as *amicus curiae*, to any court . . . [where] the independent counsel participates . . .

In re Olson, 818 F.2d 34, 45-6 (D.C. Cir. Indep. Couns. Div. 1987) (emphasis in original; statutory citations omitted).

The Attorney General's powers include the most formidable: to remove the independent counsel, pursuant to 28 U.S.C. § 596(a). A number of factors emphasize the strength of the Attorney General's removal power. An independent counsel does not discharge his duties in obscurity. Rather, as recent experience bears out, Attorneys General follow their work, often quite closely; criticisms of an independent counsel readily come to the Attorney General's attention. The Attorney General's removal power provides a potent tool, even though the Attorney General does not himself appoint the independent counsel. "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher v. Synar*, 106 S. Ct. at 3188 (quotation omitted).

As amended, the statute provides for removal of the independent counsel by "personal action of the Attorney General," for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a). What constitutes "good cause" will be decided, in the first instance, by the Attorney General. It would be a rare Attorney General who would fire an independent counsel and not maintain he had good cause to do so. Conversely, if the Attorney General has good cause, the statute does not impair his ability to act.

The Attorney General's extensive retained power "makes it clear that Congress did not provide for a substantive intrusion by independent counsel into the Executive Department," *In re Olson*, 818 F.2d at 46. On the contrary, in Congress's 1987 revision of the ethics law, the conference committee went out of its way to affirm the unreviewable nature of the Attorney General's strong retained authority:

> [t]he conferees agree that an Attorney General's determinations under the independent counsel law are not subject to judicial review. This includes such determinations as whether to investigate a person under section 591(c), whether to exercise recusal from a case, and whether to request appointment of an independent counsel.

Independent Counsel Reauthorization Act of 1987, H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987).

Moreover, the Ethics Act in no way intrudes upon what the Framers considered the most potent protection for high government officials wielded by the President on advice from the Justice Department, namely, his pardon power. Art. II, § 2, cl. 1 provides that "[t]he President . . . shall have power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Im-

peachment." [24] Edward Randolph warned, "the prerogative of pardon in [treason] cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments." 3 *Records of the Federal Convention of 1787*, at 626 (M. Farrand ed. 1911); *accord id.* at 639. By creating the prerogative of pardon, the Framers explicitly determined the means by which the President could protect his "own instruments"—such as the challengers in this case—from prosecution. Only for the pardon power, not for any kind of implicit ban against truly independent investigations, did the Framer's defend such controversial protection of high officials.[25]

The third factor in the *Schor-Nixon-Vuitton* line of cases concerns whether a statute impairs a "core" executive function, like diplomacy or command of the military.[26] This Court has been sparing in its designation of

[24] If an Attorney General requests appointment of an independent counsel and the Independent Counsel pursues high officials in the Department of Justice or the White House, but in the end, the President determines to stop that pursuit—much as President Ford decided in the end to pardon former President Nixon rather than let a special prosecutor proceed—nothing in the Ethics Act interferes with his doing so.

[25] *See The Federalist, No. 69* at 418–19 (C. Rossiter ed. 1961) (Hamilton noting the availability to the Governor of New York, as well as to the President, of the pardon power if either "should be at the head of any such conspiracy," while defending the President's pardon power because it did not block impeachment); *id., No. 74* at 448 (Hamilton, again defending the pardon power's reach, admits that "in relation to the crime of treason . . . . the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded").

[26] In its opinion below, the two-judge majority argued that "we cannot see how prosecution of federal criminal law can be other than an inherent, or core executive function." Slip op. at 51. The majority opinion below quotes from the opinions of Justice White, but these disprove the challengers' own thesis. Two of the quotes concern, not what must be left to the President, but what must *not* be taken over by Congress. Slip op. at 51 (citing *INS v. Chadha*, 462 U.S. at 1002) (White, J., dissenting) (questioning a "*legislative* check" on executive functions) and *Buckley v. Valeo*, 424 U.S. at 285 (White, J., concurring in part

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"core" executive functions and requires the function at issue to be carefully defined. Beginning with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court distinguished between two types of executive functions. First, there are "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive." *Id.* at 170. Second, there are other matters where an executive officer "is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid . . . ." *Id.* at 171. The President controls the first category, but the latter category includes duties "in the execution of which [the officer] is independent of all control but that of the laws." *Id.* at 149; *see also id.* at 139–40. Again, in a later historic case, the Court considered the "chain of command" theory and its relation to the "Faithful Execution" Clause, and parsed duties into the same two kinds, those under Presidential control, and others not under such control.[27]

and dissenting in part) (concerning if *Congress* purported to usurp the functions). (Emphasis supplied in both.) The third quote only states that there are some executive functions that "must be performed by officers subject to removal at will by the President," Slip op. at 51, (quoting *Bowsher v. Synar*, 106 S. Ct. at 3207) (White, J., dissenting); it does not say that inherently conflicted prosecutions are such a function.

[27] The divided panel below suggested this Court has thereby put only ministerial actions outside the President's absolute control, slip op. at 26 n.21, but that neither fits the manifest higher purpose of *Marbury* and *Kendall* nor the later pronouncement of this court in *Myers v. United States*, 272 U.S. 52, 132–33 (1926).

> In *Myers*, the high-water mark of the Supreme Court's upholding of the presidential powers of direction and removal, the Court cited *Kendall* while distinguishing executive duties "sometimes described as political" from "other duties." [*Myers*, 272 U.S. at 132–33]. *Myers*' distinction between "political" and other duties expressly acknowledged the differences

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In *United States v. Nixon*, 418 U.S. 683, 710 (1974), the Court noted the "utmost deference" shown to the "Presidential responsibilities" for "military or diplomatic" matters. The Court declined to show the same "high degree of deference to a President's generalized interest in confidentiality." *Id.* at 711. The question is not whether prosecution in some global sense is a "core" function, for the Ethics Act leaves many aspects of prosecution to the Attorney General—such as deciding whether to initiate an inquiry, whether to request appointment of an independent counsel, and whether to remove one for "good cause"—and places the other functions in the hands of an independent counsel, indistinguishable in many respects from other federal prosecutors. Defined carefully, the particular loss to the Attorney General is of centralized control of certain stages of prosecution.

A President does not have the same high interest in the centralized control of these stages of prosecution, occurring after the initiation by the Attorney General, as he has in his responsibility for military and diplomatic matters; he has only a general preference for such centralized control.[28] In fact, the federal courts already have the recognized and judicially approved power to appoint certain persons whose duties consist in whole or in part

in "the degree of guidance . . . that the President may exercise over executive officers," based upon the "character of their service as prescribed in the law under which they act." [*Id.* at 132.] The *Myers* Court set apart from other executive duties those duties that were "so peculiarly and specifically committed to the *discretion* of a particular officer as to raise a question whether the President may overrule or revise the officer. . . ." Thus, the Court recognized that Congress may vest discretion in an executive officer not subject to presidential direction.

Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. Rev. 59, 88–89 (1983) ("*Independent Officers.*").

[28] As discussed below, the President lacks a textual interest arising from the Constitution's "Faithful Execution" Clause.

of prosecution. *Ex Parte Siebold*, 100 U.S. 371 (1879), the leading case on court appointments (discussed further below), itself sanctions having judges choose officials with enforcement authority.[29]

The federal courts appoint U.S. Commissioners who "institute prosecutions under laws relating to the elective franchise and civil rights." *Go-Bart Co. v. United States*, 282 U.S. 344, 353 n.2 (1931); *see also Rice v. Ames*, 180 U.S. 371 (1901). Courts appoint temporary U.S. Attorneys to fill vacancies, under a statute adopted in 1863. *See United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963); *United States v. Mitchell*, 136 F. 896, 906 (C.C.Or. 1905). These temporary appointees, unlike the Independent Counsel, exercise the full range of traditional law enforcement authority.[30]

Actions by the First Congress show persuasively why centralized control of all aspects of prosecution has not been considered a "core" function.[31] That Congress established the first three government departments: Foreign Affairs (later State), War, and Treasury. The charters for the two departments serving the military and diplomatic functions included statutory injunctions of obedience, which directed them to "perform and execute such duties as shall be enjoined on or entrusted to [them] by the

[29] The election supervisors discussed in *Siebold* served the law enforcement function of deciding who to arrest for election fraud. For a description of their functioning, *see* H. Rep. No. 218, 44th Cong., 2d Sess. (1877) (a report by the House Select Committee on Alleged Fraudulent Registration and Fraudulent Voting in the Cities of New York, Philadelphia, Brooklyn, and Jersey City).

[30] Courts have also been permitted to appoint a variety of other officers. *See Collazo v. United States*, 196 F.2d 573, 582 (D.C. Cir.), *cert. denied*, 343 U.S. 968 (1952); *Birch v. Steele*, 165 F. 577 (C.C.A. Ala. 1908) (bankruptcy referees); *Hobson v. Hansen*, 265 F. Supp. 902, 914–15, 902 (D.D.C. 1967) (three-judge Court) (D.C. Board of Education) (discussing also the many different types of appointments the courts are empowered to make), *appeals dismissed*, 393 U.S. 801 (1968).

[31] *See, e.g., Myers v. United States*, 272 U.S. 52, 174–75 (1926) (importance of the First Congress's actions as a guide to constitutional interpretation).

President of the United States."[32] Clearly, the First Congress anticipated and guaranteed centralized Presidential control of such functions.

In contrast, the First Congress did not place such value on centralized control of prosecution, nor does the Executive Branch of that era appear to have been perturbed or concerned. Congress and the President left such prosecution in the hands of "district attorneys" who performed litigative services for federal officials on a fee basis. The Attorney General had no control over them, since his prime function was to advise the President and the Cabinet; the district attorneys functioned virtually on their own.[33] In the First Congress, court appointment of prosecutors came under consideration: in 1863, it was enacted into a law still in effect today, 28 U.S.C. § 546, providing for court appointment of temporary United States Attorneys. Thus, court-appointed prosecutors predated the Department of Justice, which Congress did not create until 1870.

Moreover, creation of special prosecutorial offices with insulated from political interference, has long been part of American history. Examples at the state level include Thomas E. Dewey's antiracketeering operation in New York in the 1930s; at the federal level, examples include investigations regarding Teapot Dome of the 1920's, and tax corruption in the Truman Administration.[34] Of course, the example best known today is Watergate, when this Court approved the regulations which sought to guar-

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[32] Act of July 27, 1789, ch. 4, sec. 1, 1 Stat. 28 (1789) (Department of Foreign Affairs), *amended by* Act of September 15, 1789, ch. 4, 1 Stat. 68 (1789) (changing title to Department of State); Act of August 7, ch. 7, sec. 1, 1 Stat. 49 (1789) (Department of War).

[33] L. White, *The Federalists: A Study in Administrative History* 133, 144, 406-11 (1948); *Independent Officers, supra* note 27 at 71-72, 74-75; *see In re Olson*, 818 F. 2d 34, 46 (D.C. Cir. Indep. Couns. Div. 1987).

[34] *In Re Olson*, 818 F.2d at 39-41 (Teapot Dome and Truman Administration); Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 Am. Crim. L. Rev. 577, 578 n. 5 (1973) (Dewey).

antee a Special Prosecutor's independence. *United States v. Nixon*, 418 U.S. 683, 695-96 & n. 9 (1974).

Young v. United States ex rel. Vuitton et Fils S.A. provides a recent model for how prosecutors appointed by the courts may serve special needs without centralized control by the President or the Attorney General. In that case, the defendants challenged Federal Rule of Criminal Procedure 42(b), which provides for commencement of such criminal contempt cases either "on application of the United States attorney or an attorney appointed by the court for that purpose. . . ." *Id.* at 2130.[35]

This Court rejected the argument that "prosecution of [contempts] may be initiated only by the executive branch," *id.* at 2132, and held "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such prosecution," *id.* at 2134. The Court regarded prosecution as not so uniquely executive as to preclude evaluation of that Rule's purposes. "Courts cannot be at the mercy of another branch in deciding whether such proceedings should be initiated." *Id.* at 2131. *Vuitton* is one of many current exceptions to centralized Attorney General control. As a prominent example, the federal grand jury itself, although often steered in its mission by Justice Department prosecutors, has an important reserve of authority independent of the Executive Branch and subject only to judicial supervision.[36]

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[35] The district court had appointed two attorneys to prosecute defendants in criminal cases for contempt of a trademark infringement injunction. Upon conviction by a jury, defendants received sentences ranging from six months to five years in prison. 107 S. Ct. at 2128-29. The defendants "contend[ed] that the District Court lacked authority to appoint *any* private attorney to prosecute the contempt action against them, and that, as a result, only the U.S. Attorney's Office could have permissibly brought such a prosecution." *Id.*

[36] Fed.R.Crim.P. 6(a)-(c) (judicial supervision of grand jury); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (broad grand jury investigative powers); *Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973) ("The federal grand jury is . . . legally independent of the Executive . . . . If the grand jury were a legal appendage of the Executive, it could

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Thus, the function at issue here, of centralized control of some aspects of the prosecution of high government officials, differs from *bona fide* "core" functions such as diplomacy, or command of the military. The Ethics Act leaves so large a role to the Justice Department that its intrusiveness is quite limited. The Act serves a high purpose, carefully measured out by enactment based upon extensive and twice-reaffirmed consideration of the issues. By the standards this Court uses for statutes which in no way grant Congress itself any appointment, veto, or removal powers, the Ethics Act comports clearly with the separation of powers.

II. "COURTS OF LAW" MAY CONSTITUTIONALLY APPOINT INDEPENDENT COUNSELS

The challengers present two Appointments Clause grounds for striking down the challenged Act of Congress. First, pursuant to that Clause, "principal" officers (i.e., those not "inferior") receive appointments only after nomination by the President and confirmation by the Senate. Through the Ethics Act, an independent counsel receives his appointment without such nomination and confirmation. The challengers maintain that an independent counsel is a principal, not an inferior, officer, and, therefore, concluded that the Ethics Act violates the Appointments Clause. Slip op. at 10-23. Second, the challengers assert that the Ethics Act must fall even though it follows the plain language of the clause allowing appointment by the "Courts of Law" (here, the "Special Division" of the D.C. Circuit) because of supposed incompatibility between the executive nature of such counsels and judicial appointment.

By its express language, the Appointments Clause, art. II, § 2, cl. 2, states that the President:

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hardly serve its historic functions as a shield for the innocent and a sword against corruption in high places."); Note, *The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification*, 87 Yale L.J. 1692, 1701-06 (1978).

> shall nominate, and by and with the Advise and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such inferior officers, as they think proper*, in the President alone, *in the Courts of Law*, or in the Heads of Departments.

(Emphasis supplied.)

That Clause expressly and repeatedly authorizes Congress to vest appointment power in "Courts of Law." "Congress" performs the investing. The vesting occurs "by Law," meaning by an act of Congress. Above and beyond this, the Framers added the extraordinary phrase, "as they think proper," thereby stressing that the Clause leaves the decision to what "they," the Congress, "think."

The challengers of this Act of Congress fail to pay any reasonable deference to the plain language of the Constitution. "To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. 'In expounding the Constitution of the United States . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used, or needlessly added. . . .'" *Wright v. United States*, 302 U.S. 583, 588 (1938) (Chief Justice Hughes). "[W]e cannot for a moment believe that a single superfluous word was used . . ." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840). The phrase, "as they think proper," refutes any theory of implicit restriction; the Framers could hardly have picked a phrase more indicative of discretion and more antithetical to restriction. It strains credulity to suggest that the Framers would have chosen that phrase if they meant the Clause to place unstated limits on what types of appointment could be vested in each of the three alternatives.

As its first ground for the Appointments Clause challenge, the two-judge majority below concluded that "the

independent counsel's authority is so broad as to compel the conclusion that she is a principal officer . . . ." Slip op. at 21. Under the Supreme Court standard enunciated in *United States v. Germaine*, 99 U.S. 508, 509-10 (1878), and reaffirmed in *Buckley v. Valeo*, 424 U.S. 1, 125 (1976), "inferior officers" are any "officers inferior to those especially mentioned." "Inferior" does not mean "petty or unimportant" but simply having "less power" and "inferior to those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments." *Collins v. United States*, 14 Ct. Cl. 568, 574 (1878). *See United States v. Eaton*, 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.").

The Attorney General, a "head of department" since 1870, directs prosecutions nationwide, and even a United States Attorney directs prosecutions districtwide, both with long-term tenure. In contrast, the Ethics Act gives an independent counsel narrowly circumscribed duties and an inherently limited-term job status. The independent counsel has authority only regarding a specific grant of jurisdiction.

This particular Independent Counsel illustrates those narrow bounds. Her efforts to broaden her prosecutorial authority from one former Justice Department official (Mr. Olson) to three, relying on her investigation, have been rejected by the Attorney General and, therefore, by her appointing court. *See In re Olson*. The Attorney General all but acknowledged an independent counsel's nature as an inferior officer when he issued Independent Counsel Lawrence E. Walsh, and other independent counsels, parallel "Special Prosecutor" appointments, reminiscent of those received by the Watergate Special Prosecutors. The Attorney General, as a "head of department,"

could appoint Walsh only because the independent counsel was an inferior officer.[37]

Congress itself clearly viewed the independent counsel as an "inferior officer," and rejected contrary notions for good reason. As the House Committee on the Judiciary found:

> This discretionary power of the Attorney General to ask for the appointment of an independent counsel clearly establishes the independent counsel as an "inferior" officer whose very existence is contingent upon the action of the Attorney General. In addition, these independent counsel are inferior officers in the sense that they are of lesser importance and are confined in their duties to a single investigation of a temporary nature. The argument that for these officers to be "inferior" requires that they have superiors in a direct supervisory role is refuted not only by this understanding of "inferior", but also by the fact that the officials whose appointment was validated in *Ex Parte Siebold* had no direct supervisory officials, but were inferior in the sense used here.

H.R. Rep. No. 100-316, *supra*, at 23. "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). An independent counsel is, at most, an inferior officer.[38]

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[37] If the Attorney General agreed with the two-judge majority below that Walsh were a principal officer, he would instead have had to leave the appointment to the President and the Senate.

[38] Subsequent judicial interpretation has added a third category to the two previously mentioned—"employee." *United States v. Germaine*, 99 U.S. 508 (1878), held that a civil surgeon appointed pursuant to statute by the Commissioner on Pensions was not an inferior officer but merely an employee. The term "officer", the Court said, "embraces the idea of tenure, duration, emolument, and duties, and that the latter were continuing and permanent not occasional or temporary." *Id.* at 511-12. Noting that the surgeon acts "only when called on . . . in some special case," is not paid through "regular appropria-

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Separately, the challengers urge that the courts should not have apointment authority for an officer with the independent counsel's executive functions. Slip op. at 29–42. Their theory is that the "Courts of Law" may only appoint officers subordinate to judges, such as clerks of courts, not an officer with executive functions. However, the plain language of the provision imposes no such restriction, and none can be found in the contemporaneous understanding of the Framers.

In the Framers' era, characterized by wide variety in methods for appointing government attorneys, court appointment of prosecutors certainly was not unusual, and may have been common.[39] State models certainly influ-

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tion," and may not be called upon in a given year, the Court determined that the surgeon's duties were "not continuing and permanent" but merely "occasional and intermittent." *Id.* at 512.

Similarly, in *Auffmordt v. Hedden*, 137 U.S. 310 (1890), the Court held that a merchant appraiser was a mere employee, "an expert, selected as an emergency arises." *Id.* at 326. He had "no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case." *Id.* at 327. Given the temporary and one-time-only nature of the Independent Counsel's job, she could conceivably be classed as a mere employee, a possibility alluded to by the Solicitor General. *See* Brief for the United States as *Amicus Curiae*, *Young v. United States ex rel. Vuitton et fils S.A., et al.*, Nos. 85-1329 & 85-6207 (U.S., filed Oct. 1986) at 17.

[39] By the advent of the American Revolution, private prosecution had been virtually eliminated in the American colonies and had been replaced by a series of public officials who were charged with handling criminal matters. The nature of these officials varied. Some were county officials *appointed by the courts*; some were deputies of the Attorney General but were *nominated by the county court* and operated with little supervision; some were deputies of the Attorney General directly under his view.

J. Jacoby, *The American Prosecutor: A Search for Identity* 19 (1980) (emphasis supplied). For the wide variety in state methods for choice of Attorneys General, see Mass. Const., art. XVII (1780) (Attorney-General elected); Va. Const. (1776) ("The two Houses of Assembly shall, by joint ballot, appoint Judges . . . and the Attorney-General"); Del. Const., art. 12 (1776) ("The president and privy council shall appoint

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enced the Framers.[40] For example, an important model for the Framers, New York's Constitution of 1777, provided "that all attorneys, solicitors, and counsellors at law hereafter to be appointed, be appointed by the court . . ." New York Const., art. XXVII (1777). In other words, in New York State, where *The Federalist* was published and the First Congress met, courts appointed the prosecutors.

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the secretary, [and] the attorney-general . . . ."); S.C. Const., art XXIX (1978) ("That two commissioners of the treasury . . . [and the] attorney general . . . [shall] be chosen in like manner by the senate and house of representatives jointly, by ballot"); Pa. Const., sect. 20 (1776) ("The president . . . with the council . . . shall have power to appoint and commissionate [sic] judges . . . [the] attorney general and all other officers . . . ."); N.C. Const., art. XIII (1776) ("the General Assembly shall . . . appoint Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney General . . . ."); N.H. Const., Part II (1784) (unnumbered article headed "Executive Power—President") ("All judicial officers, [and] the attorney-general . . . shall be nominated and appointed by the President and council").

A number of states included their attorney general in the same constitutional provision as judges. *See, e.g.*, N.J. Const. art. XII (1776) (appointment by the Council and assembly prescribed in the same article for attorney general, judges, justices of the peace, and clerks).

The non-Executive appointment of state Attorneys General survived the infancy of the Republic. Even today the Attorney General of the State of Tennessee is appointed by that state's Supreme Court rather than by the Governor. Tenn. Const., art. 6, § 5, Tenn. Code Ann. § 8-6-101.

[40] Hamilton remarked that the plan adopted for the judiciary at the Constitutional Convention was not "novel and unprecedented" but instead derived from provisions in the constitutions of several states. *The Federalist* No. 81 (C. Rossiter ed. 1961). These state constitutions served as "models" for the judicial structure created by the Framers and, as Hamilton noted, "[t]he preference has been given to these models is highly to be commended." *Id.* These included Georgia, which, as quoted above, provided that the justices of the State Supreme Court could appoint, *pro tempore*, the "attorney for the State." Three other states which had made Hamilton's list of preferred models—Virginia, North Carolina, and South Carolina—provided that the State Legislature could appoint the state Attorney General. In short, at the time the Constitution was adopted there was ample precedent for the appointment of government attorneys by entities other than the Executive.

That Constitution's language authorizing "Courts of Law" to make appointments reflects the Framers' familiarity with, and acceptance of, the New York model. Considering that prosecutors have always been "officers of the court," if the Framers wished to prevent the "Courts of Law" from appointing such "officers of the court," they would have used language expressing such a limit, as the Framers did when they allowed Congress to appoint only legislative officers. *Buckley v. Valeo*, 424 U.S. at 127–28.

Moreover, the actions of the Special Judiciary Committee of the First Senate demonstrate that its members saw nothing in the Constitution requiring that the President have exclusive control of appointment. In the spring of 1789, the nation's First Congress gathered in New York City. The very first substantive business taken up by the Senate was the creation of a judicial system.[41] Once a quorum was established on April 6, 1789, the Senate appointed a Special Judiciary Committee consisting of eight Senators. Eventually, two additional members were added so that the Special Judiciary Committee was composed of one-half of the entire Senate, ten members, one from each state that had sent Senators to New York. Of the eight original Committee members, five "had served in the Federal Convention of 1787 and were familiar with its intent as to the Judiciary." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 57 (1923) (citing *Wisconsin v. Pelican Insurance Company*, 127 U.S. 265, 497 (1888)). Because so many of the Committee's members "had taken part in framing th[e] instrument," the content of the Judiciary Act "is contemporaneous and weighty evidence of [the Constitution's] true meaning." *Id.*

This first Judiciary bill addressed, among other things, the problem of securing attorneys for the federal govern-

[41] The task of creating the great executive departments—Foreign Affairs, War, and Treasury—had already obtained the attention of the House of Representatives.

ment.[42] Section 32 of the Committee bill provided for appointment of the district attorneys that:

> . . . each *District Court shall appoint* a meet Person learned in the Law to act as Attorney for the United States in such District, and shall swear him to the faithful Execution of his Office, whose duty it shall be to [prosecute] in such District all Delinquents for Crimes & Offences, cognizable under the authority of the United States and all [ci]vil Actions [in which] the United States shall be concerned. . . .[43]

(Emphasis supplied). The bill provided further regarding appointment of the Attorney General, that "*the Supreme Court shall also appoint* a meet person learned in the Law to act as Attorney General for the United States . . .

[42] It is illuminating that the topic of attorneys for the United States was considered germane to the creation of the Judiciary rather than to the parallel creation of the Executive Branch which was then underway in the House.

[43] Noted judicial historian Charles Warren discovered the original handwritten Senate Judiciary Committee bill, S. 1, 1st Cong., 1st Sess. (1789). Up until his article, Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923), "no adequate account of this famous legislation ha[d] ever been written." *Id.* at 49. Even the "able and careful biographer" of Senator Oliver Ellsworth, principal draftsman and floor manager of the bill, thought in 1905 "that no complete history of the bill [could] be written." *Id.* (citing W.G. Brown, *Life of Oliver Ellsworth*).

What Warren describes as "[r]ecent researches by the present writer" turned up the long sought original papers. That find allowed Warren to describe in detail the journey of the historic bill from Committee consideration through final passage. It also allows us, in 1988, to learn the original intent and understanding of the Farmers as to the requirements of the Appointments Clause with respect to federal attorneys. The handwritten original is in the National Archives and is now available in reproduction. The source for the language quoted herein is the First Congress Legislative History Project, 5 *Legislative Histories* 1172–94 (Senate Bill 1 as reported to the Senate by Committee member, Senator Richard Henry Lee of Virginia on June 12, 1789). The language in quotes was supplied by the editors of the legislative history project from reference to a printed copy found in the Broadside Collection.

whose duty it shall be to prosecute and conduct all Suits in such Court in which the United States shall be concerned. . . ." *Id.* (emphasis supplied).

Thus, a Committee of half the first Senate, composed in large part of veterans of the Constitutional Convention, decided to vest the appointment of all the government's attorneys in the courts, as in the constitution of New York State. Evidently, they saw no inconsistency between the Appointments Clause they had agreed to in 1787 and the court-appointed federal attorneys they decided on in 1789. The evolution of a compromise law [44] shifting the appointive authority from the courts to the President illustrates the discretion vested by the Appointments Clause in Congress.[45] That ultimate decision stemmed

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[44] Vice President John Adams, from his perch presiding over the Senate, noted to a friend that

> The judicial bill is still under consideration of the Senate and altho' it has undergone many alterations and amendments it is impossible to say what further changes may be made in the house of representatives. The district Judges may be annihilated altogether, and the number of supreme judges as well as the number of circuits doubled. The Attorney general is now to be appointed by the President with the consent of the Senate, . . . we are upon an amendment made a few days ago, if this plan continues the Attorney Gen. will appoint persons to act for him or the court will appoint in his appearance in the district courts.

John Adams to Francis Dana, June 10, 1789, from the Massachusetts Historical Society, Adams Manuscript Trust.

[45] Ellsworth appears to have been moved to alter the appointing authority by Chancellor Robert Livingston. During the spring and summer of 1789, Ellsworth circulated the draft bill to many learned men. Livingston responded that he had "read it over with attention, & am much pleased with the system as both cheap & expeditious." Robert Livingston to Oliver Ellsworth, June 26, 1789, Huntington Library, San Marino, California. Though "much pleased," Livingston detailed a number of suggestions and observations including his belief that only one circuit would be necessary, a call for a limitation (based on the importance of the case) on diversity jurisdiction, an alteration in the power to grant new trials and his belief that it would be "better" that "the Attorney General be appointed by the Executive to which department he necessarily belongs." *Id.*

not from any constitutional mandate but simply from discretionary choice.

The Court's opinion in *Ex Parte Siebold*, 100 U.S. 371 (1879), resolves any remaining doubts. In *Siebold*, this Court upheld a statute vesting in the courts the power to appoint election supervisors, an executive office, rejecting a challenge that the office was one for which only the President could appoint. The Court stated that:

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is *no absolute requirement* to this effect in the Constitution . . . .
>
> [A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, *is a matter resting in the discretion of Congress*. And, looking at the subject in a practical light, it is perhaps better that it should rest there.

Siebold, 100 U.S. at 397–98 (emphasis supplied).

Siebold set as its implied limit that there be "no such incongruity in the duty required as to excuse the courts from the performance, or to render their acts void." *Id.* 398. The parade of potential horribles used by the challengers ignores this limit of "incongruity", which excludes judicially-appointed generals or assistants to the Secretary of State. However, the Independent Counsel's duties lie appropriately within the competence and sphere for appointment by judges. A prosecutor serves as an officer of the court, working in and around the court, subject to the rulings and instructions of the court. He is "the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer." *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. at 2135 (quotation omitted) (describing the function of a court-appointed prosecutor of criminal contempts). Even the panel majority below conceded that "[o]f course most

judges have a good deal more experience with criminal prosecution than with foreign affairs." Slip op. at 41.

Appellees' challenge to judicial appointment on incompatibility grounds overlaps with a similar challenge on Article III grounds. The Article III challenge goes on to criticize not only court appointment of the independent counsel, but also court issuance of the order defining her jurisdiction (and the statutory provision, never yet invoked, for judicial termination of a runaway counsel's office). Slip op. at 74–87. However, as the dissent below noted, in issuing its jurisdictional order the Special Division acts upon the Attorney General's submission. Slip op. at 8–9 (dissenting opinion). Issuance of such an order is a function implicit in appointment of a temporary officer. *Id.* at 37.

The Special Division's function in making this appointment comports with the classic judicial function of preserving the integrity of the judicial process.[46] Judicial appointment which avoids the appearance of prosecutorial bias was the goal approved in *Young v. U.S. ex rel. Vuitton et Fils S.A.*[47] In separating the choice of prosecutors

[46] As the Fifth Circuit noted in *United States v. Cowan*, 524 F.2d 504, 512 (5th Cir. 1975), *cert. denied sub nom. Woodruff v. United States*, 425 U.S. 971 (1976), it is "manifestly clear" that Supreme Court doctrine "clothe[s] the federal courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice. . . ."

If aspects of the Special Division's role are not incidental to the appointment function, the Special Division may handle them as Article III cases or controversies. Slip op. at 38 (dissenting opinion).

[47] Because "[p]ublic confidence in the disinterested conduct of [the prosecution] is essential," the Court, in *Vuitton*, announced "a categorical rule against the appointment of an interested prosecutor." *Vuitton*, 107 S. Ct. at 2141. The Court concluded that bias or even the appearance of bias posed so great a threat to the integrity of the judicial process and to public confidence in the courts that harmless error analysis could not even be contemplated. *See id.* at 2138–2141. " '[J]ustice must satisfy the appearance of justice,' " and "a prosecutor with conflicting loyalties presents the appearance of entirely the opposite." *Id.* at 2140 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

Continued

for high government officials from those officials and their colleagues, the Ethics Act merely carries out to the extent necessary the ancient maxim that no man should be judge or prosecutor in his own case. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955). As described above, today courts appoint officers to a range of posts with executive functions, from temporary United States Attorneys to U.S. Commissioners.[48]

The Court's opinion expresses abhorrence for the very idea of bias in prosecution and repeatedly emphasizes that impartiality—both real and apparent—are absolutely essential to the administration of justice. The prosecutor is not the representative of "an ordinary party" but "of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Vuitton*, 107 S. Ct. 2135 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). This goal must always be "that justice shall be done." *Id. See* EC 7-13, ABA Model Code of Professional Responsibility (1982).

[48] In his brief filed in the *Vuitton* litigation, the Solicitor General acknowledged the propriety of judicial appointment of prosecutors where there is "substantial justification" and "conformity with principles of fairness, sound judicial administration, and disinterested exercise of federal prosecutorial responsibility." Brief for the United States as *Amicus Curiae*, *Young v. U.S. ex rel. Vuitton et Fils, S.A.*, Nos. 85-1329 & 85-6207 at 1-2 (U.S., filed October 1986). The Solicitor General specifically pointed to the Independent Counsel as an appropriate departure from the norm. *Id.* at 19 n.14.

Similarly, as the Justice Department testified during initial enactment of the ethics law, *Public Officials Integrity Act of 1977, Hearings, supra* note 16, at 15–17 (testimony of John M. Harmon, Acting Assistant Attorney General of the Office of Legal Counsel), "[we] do not believe that an 'incongruous' duty would be imposed upon the courts. *See Ex Parte Siebold*, 100 U.S. 371, 398 (1879)."

The challengers have argued that they "may be impelled to engage in subtle calculations concerning the possibility of offending the court by pointing too vigorously to alleged overreaching by fellow judges or by an officer appointed by and supervised by fellow judges." Slip op. at 86. Considering that every appeal, including this one, involves "pointing" to alleged mistakes by "fellow judges," the challengers should be able to find counsel experienced with those "subtle calculations."

III. INDEPENDENT COUNSELS COMPORT WITH "FAITHFUL EXECUTION"

A final request to strike down this Act of Congress relates to the "Faithful Execution" Clause. The challengers repeatedly invoke this Clause as the textual basis for their criticism of the lack of supervision of the Independent Counsel by the Attorney General, of the lack of authority for him to remove her (other than for "good cause"), and of her supposed "supervision" by the Judiciary. Slip op. at 24, 26, 30, 52, 60 (quoting or citing the "Faithful Execution" Clause). From this Clause, they derived a thoroughly novel theory of "a unitary executive" with the President possessing universal power to direct and remove every officer, whatever his legal duties or the potential for conflicts of interest, so long as throughout the government "the chain of command leads directly upward to the President." Slip op. at 27. This issue the challengers frame in terms of how their "protection . . . is taken away," slip op. at 70, meaning that they lose the protection they would receive from the Attorney General dispensing with the enforcement of law that an independent prosecutor deems appropriate.

Indisputably, the Ethics Act seeks to redress the problems found during Watergate by limiting the ability of White House or Justice Department officials to dispense with, or otherwise undermine, investigations and prosecutions of high government officials. The act seeks to avoid future John Deans and Saturday Night Massacres, as well as the subtler problems of conflict of interest, bias, and loss of public confidence in the administration of justice. Those who read into the "Faithful Execution" Clause a guaranteed "unitary" government organization, and an inherent presidential prerogative for the President to dispense with prosecutorial steps, ignore the Clause's evident meaning. By its wording and history, the "Faithful Execution" Clause exists primarily to limit Executive power, and not as a basis for the Executive to have laws struck down. As Justices Frankfurter and

Holmes said, "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (quoting Holmes, J.).

The Clause derives from the historic conflicts between Parliament and the Stuart monarchy in 17th century England. James II claimed, as King, that he possessed "suspending" and "dispensing" powers, which allowed him to decide for himself that at some times or for some people, certain laws need not be obeyed. The British courts rejected that claim in 1688, shortly after which the Glorious Revolution forced James II into exile and the English Bill of Rights was enacted.[49] That historic charter of freedom declared that "the pretended power of *suspending of laws, or the execution of laws* by regall authority, without consent of Parlyament is *illegal*." 1 W. & M., sess. 2, ch. 2 (1688) (emphasis supplied). "Scholars have concluded that the 'faithful execution' clause of our Constitution is a mirror of the English Bill of Rights' abolition of the 'suspending power,' that is, the abolition of what the English Bill of Rights had called 'the pretended (Royal) power of Suspending,'. . . ." [50]

As Justice Jackson noted, "[t]he example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III . . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

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[49] *See Ameron Inc. v. U.S. Army Corps of Engineers*, 610 F. Supp. 750, 755 (D.N.J. 1985), *aff'd*, 809 F.2d 979 (3d Cir. 1986), *pet. for cert. filed*, 56 U.S.L.W. 3116 (U.S. July 27, 1987) (No. 87-163); *The President's Suspension of the Competition in Contracting Act is Unconstitutional:* H.R. Rep. No. 138, 99th Cong., 1st Sess. 8-16 (1985); *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 264 (1985); Reinstein, *An Early View of Executive Powers and Privileges: Trial of Smith and Ogden*, 2 Hastings Con. L. Quart. 398, 321 (1976); Stewart, *The Trial of the Seven Bishops*, Cal. St. Bar. J., Feb. 1980, at 70.

[50] *Ameron*, 610 F. Supp. at 755; *see* Reinstein, *supra* note 47.

579, 641 (1952) (concurring opinion). Several states included provisions in their original constitutions akin to the English Bill of Rights,[51] and the Constitutional Convention rejected the proposal that the President be empowered to "suspend" the laws.[52] Instead, following the model of the English Bill of Rights, the Framers adopted the "Faithful Execution" Clause to limit, not to expand, the Executive's power. As Judge Ginsburg observed:

> However, it is far from evident that the duty to "take Care" was intended to establish unbridled authority in the President and his men. More plausibly, the words were meant to import a limitation: "Indeed, the Framers probably included the 'faithful execution' clause in the Constitution to limit, not expand, the President's power. The clause was intended to rule out any power for him to dispense with, or suspend, the execution of the laws. Thus, the President may not always have the power to direct the execution of the laws, but merely a duty to do so when the laws have not excluded his direction." [53]

In this respect, the challengers overlook this Court's historic decisions on this subject. *Marbury v. Madison*, 5 U.S.

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[51] "The power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature . . . ." N.H. Const, art. XXIX (1784); "[the Governor has the duty] to take care that the laws are faithfully executed to the best of his ability," N.Y. Const., Art. XIX (1777); "all powers of suspending laws, or the execution of laws, by any authority . . . ought not to be exercised," N.C. Const., art. V (1776); "[the President, with the council,] are also to take care that the laws be faithfully executed," Pa. Const., sec. 20 (1776); "all power of suspending laws, or the execution of laws, by any authority . . . ought not to be exercised . . . ." Va. Const., sec. 7 (1776).

[52] A proposal was made in the Constitutional Convention "that the national executive have a power to suspend any legislative act . . . ." The Convention rejected the proposal. IV J. Elliot, *Debates in the Federal Convention* 623 (2d ed. 1836).

[53] Slip op. at 14 n. 19 (dissenting opinion) (quoting *Independent Officers*, *supra* note 27, 63 B.U.L. Rev. at 90).

(1 Cranch) 137, 170–71 (1803); *Kendall v. United States ex. rel Stokes*, 37 U.S. (12 Pet.) 524, 616 (1838).[54] "[T]o contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Kendall v. United States ex. rel Stokes*, 37 U.S. (12 Pet.) 524, 616 (1838). See page 19, *supra*.

With respect to the particular question of the modest "for cause" restriction on the Attorney General's power to remove the Independent Counsel, the Supreme Court has long upheld such restrictions. As early as 1886, the Supreme Court held that as to inferior officers, such as the independent counsel, the "constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to officers so appointed." *United States v. Perkins*, 116 U.S. 483, 485 (1886). The Court rejected the argument that the removability provision there challenged was "an infringement upon the constitutional prerogative of the Executive," holding instead that the Congress "may limit and restrict the power of removal as it deems best." *Id.* at 485.[55]

Subsequent cases similarly sustain the Ethics Act's removal provision. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), upholds the existence of independent agencies or officers, statutorily insulated from removal without cause by the Executive Branch. The Court's reasoning upholding the constitutionality of independent

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[54] *Kendall* challenges the "vesting in the President [of] a dispensing power," *id.*, 37 U.S. (12 Pet.) at 613, a phrase hearkening back to the two claimed powers, dispensing and suspending, of the English King which had underlain the English Bill of Rights' provision from whence developed the "Faithful Execution" Clause. *See Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 356, 363 (C.C.D.S.C. 1808) (No. 5,420); *United States v. Smith and Ogden*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,341a); II G.L. Haskins & H.A. Johnson, *History of the Supreme Court of the United States* 298–304 (1981) (*Gilchrist* case); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 Geo. Wash. L. Rev. 285, 309–21 (1950); Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 1 n. 3 (1983).

[55] *Perkins* was cited with approval even in the case constituting the zenith in enthusiasm for exclusive executive removal. *See Myers v. United States*, 272 U.S. at 161.

agencies, many of which have law enforcement powers, applies with equal force to the Independent Counsel. In reaching its conclusion that independent agencies were constitutionally valid, the Supreme Court stressed the legislative determination that the agency in question must be "non-partisan" and "from the very nature of its duties, act with entire impartiality." *Id.* at 624; *see also id.* at 625. "[I]n the contemplation of the statute," the agency's duties could only be effectively performed "without executive leave" and "free from executive control." *Id.* at 628.[56] In *Wiener v. United States*, 357 U.S. 349 (1958), the Court went so far as to imply restrictions where the challenged statute was actually silent. The Court pointed to "the nature of the function that Congress had vested" in the officer as the crucial factor in determining the existence and propriety of limitations on the Executive's power of removal. *Id.* at 353–54.

For the Attorney General to dispense with prosecutions against officials close to him, whether through instructions on through removal of the Independent Counsel, would violate the essential purpose of the "Faithful Execution" Clause. As the Court noted in *Bowsher*, 106 S. Ct. at 3191, removability leads to subservience. The Act's limitations on removability ensure that the Independent Counsel enjoys some *bona fide* independence while leaving the Attorney General considerable latitude to act in any situation where genuine grounds exist for removal.[57]

[56] This Court again displayed its strong belief in the constitutional validity of independent agencies in *Schor*, where it disparaged "formalistic and unbending rules." 106 S. Ct. at 3258. *Schor* advocated "[l]ooking beyond form to the substance of what Congress has done" and "weigh[ing] a number of factors . . . with an eye to the practical effect that the Congressional action will have on the constitutionally assigned role." *Id.* In upholding the challenged statute, the Court in *Schor* accepted "evidence of valid and specific legislative necessities" and of the likelihood that a contrary result would " 'defeat the obvious purpose of the legislation.' " *Id.* at 3258 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

IV. CONCLUSION

The Ethics Act prevents the impression that high government officers receive improper "dispensations" from the rule of law because of their relationship to those controlling the prosecution. Like the legislation upheld in *Schor*, it is untainted by Congressional "self-aggrandizement." Rather, it tracks the plain language of the Appointments Clause in vesting appointment in the "Courts of Law," and comports with the clear intent of the "Faithful Execution" clause in its carefully crafted restrictions on Executive dispensing power. This Court should uphold this Act of Congress.

[57] The challengers also argue that the Ethics Act creates further constitutional problems when an "independent counsel adopts positions at odds with the remainder of the Executive Branch." Slip op. at 57. It is difficult to see the problem. A state criminal prosecutor may present a state court with a position that the federal State Department opposes. In that case, the court accepts the State Department position, or the prosecution's position, depending on the issue. *Cf. Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (state case touching on foreign affairs; Department of Justice appears as *amicus curiae*). This system works well for the many commercial cases in which the courts reconcile the position of the State Department with that of other parties, *see, e.g., First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 761 (1972) (resuming case after earlier "vacat[ing] the judgment of the Court of Appeals for consideration of the views of the Department of State"). The Justice Department has not been shy about presenting its views separately in past cases handled by special prosecutors, *see United States v. Nixon*, and does not seem to be so in this case.

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MARCH 1988.

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Supreme Court, U.S.
FILED
MAR 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

(9)

No. 87-1279

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT

v.

THEODORE B. OLSON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF UNITED STATES SENATE AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1279

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT

v.

THEODORE B. OLSON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF UNITED STATES SENATE AS AMICUS CURIAE

This brief for the United States Senate as amicus curiae [1] in support of the constitutionality of the independent counsel law does not attempt to treat all of the questions raised by the court of appeals, but focuses instead on the central issues of judicial appointment and "good cause" removal. While discussions about appointment commonly precede those about removal, we have reversed that order for several reasons. The history of the removal provision demonstrates well, we believe, the concept of the office created by the independent counsel statute and contributes to an understanding of the nature of the appointment. Also, an understanding of the relation-

[1] The interest of amicus is set forth in 2 U.S.C. 288e(a), which provides that the Senate may direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear is "of right" and may be denied only for untimeliness. *Id.*, 288*l*(a). *See* S. Res. 281, 100th Cong., 1st Sess., 133 Cong. Rec. S11880-81 (daily ed. Sept. 9, 1987) (directing appearance in this case).

ship between the President or the Attorney General and an independent counsel may bear upon the question whether an independent counsel is an inferior officer under the Appointments Clause. We rely on the brief of the independent counsel to describe why she may be appointed as an inferior officer, but, to the extent that it is relevant whether an inferior officer is accountable to a head of a department, the removal provision demonstrates the accountability of independent counsel to Attorneys General.

SUMMARY

I. The Attorney General's authority to remove an independent counsel for cause preserves the President's ability to perform his constitutional responsibilities. Congress's consideration of special prosecutor legislation began during Watergate, which demonstrated that a statutory guarantee of independence was essential to an investigation free of unwarranted executive interference. All participants in the debate recognized the need to guarantee independence in investigating alleged wrongdoing by high officers of the executive branch. Against the need for independence Congress recognized the importance of respecting the executive's preeminent role in law enforcement. To balance independence and accountability Congress followed the guidance of the American Bar Association and the Department of Justice by providing for prosecutors to be removed by the Attorney General only for "extraordinary impropriety" or disability. 28 U.S.C. 596(a)(1) (Supp. V 1981). To accommodate constitutional concerns further, Congress subsequently lowered the standard for removal to "good cause," 28 U.S.C. 596(a)(1) (1982), to match other statutory provisions.

This Court has long recognized that executive officers' relation to the President depends on whether they assist in the performance of constitutional functions or perform statutory duties assigned by law. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838). The

First Congress's organization of the executive branch reflects these differences. Notably, district attorneys were not placed under even the Attorney General's supervision. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92. Although Congress subsequently has centralized law enforcement in the Attorney General, that statutory development does not diminish Congress's ability to prescribe other arrangements for "carrying into Execution" criminal prosecutions. Art. I, sec. 8, cl. 18. This Court has established that the President's authority to remove executive officers also depends upon the nature of their duties. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

The provision for removal of independent counsel enables the executive branch to "accomplish[] its constitutionally assigned functions," *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977), including the duty of the President under the "Take Care" Clause "to see that the officer assigned by law performs his duty *faithfully* — that is, *honestly:* not with perfect correctness of judgment, but *honestly.*" 1 Op. Att'y Gen. 624, 626 (1823) (emphasis in original). The removal provision assures that an independent counsel "is ultimately accountable not only to the American people but to the President for serious misconduct in office." 122 Cong. Rec. 23054 (1976) (Sen. Percy).

By vesting removal authority in the Attorney General, the Congress has left it to the executive to construe and apply the provision in the first instance, and there is no warrant for resolving difficult interpretative issues in anticipation of the provision's use. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

II. Congress's determination to vest authority to appoint independent counsel in the Special Division of the court, upon application of the Attorney General, 28 U.S.C. 593(b), resulted from Congress's conclusion that a statutory system for independent counsel is necessary,

that temporary counsel are less intrusive than a permanent independent prosecutorial office, and that appointment by the courts is the best way of ensuring the impartiality central to the independent counsel concept.

The plain text of the Appointments Clause, Art. II, sec. 2, cl. 2, authorizes Congress to vest authority to appoint independent counsel "in the Courts of Law." The history of the evolution of the Clause at the Constitutional Convention provides no basis for the narrow reading of the Clause adopted by the court of appeals, but suggests to the contrary that the alternative appointment mechanism may have been annexed to the Clause in part to satisfy those Framers who favored granting the Congress meaningful discretion in delegating the responsibility for appointments.

In *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1880), this Court squarely held that the Appointments Clause permits Congress to assign to the courts the duty to appoint executive officers unless judicial appointment would be "incongruous." The court of appeals erroneously disregarded *Siebold* because it misperceived the nature of the duties of the officers whose appointments were sustained there. The federal election supervisors in *Siebold* were not mere election observers, as the court of appeals believed, but were law enforcement officers charged with implementing the federal government's effort during Reconstruction to enforce voting rights in congressional elections under the Fifteenth Amendment. *Siebold*, therefore, provides strong support for judicial appointment of independent counsel. As in *Siebold*, appointment by the courts is not incongruous because appointment could not "with any greater propriety . . . have been assigned to any other depositary of official power." *Id.* at 398.

Nor does judicial appointment of independent counsel "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443. The appointment provision minimizes intrusion on the executive by focusing solely on cases where the executive has a conflict of interest and reserving to the Attorney General sole authority to identify those cases in which the law requires an appointment. The single task assigned to the courts is the selection of an impartial investigator once the Attorney General's action triggers the appointment.

ARGUMENT

I.

THE AUTHORITY TO REMOVE AN INDEPENDENT COUNSEL FOR CAUSE PRESERVES THE PRESIDENT'S ABILITY TO PERFORM HIS CONSTITUTIONAL RESPONSIBILITIES

The independent counsel law is grounded on the fundamental premise that a counsel's independence should be secured statutorily to the extent constitutionally permitted, while accountability should be assured, through the Attorney General's power to remove for good cause. After describing in part A the legislative history of the determination to assign to the Attorney General the power to remove for cause, we discuss in part B the constitutional predicates for the grant of independence and describe how the authority to remove for good cause preserves the President's ability to perform his constitutional responsibilities. In the concluding part, we suggest that the Court should construe the removal provision as necessary to avoid constitutional questions.

A. The Ethics Act Balances the Needs of Independence and Accountability

Congress began considering special prosecutor legislation in the wake of President Nixon's dismissal of Archibald Cox as Watergate special prosecutor. Attorney General Elliot Richardson had appointed Cox pursuant to regulations guaranteeing him "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within

the jurisdiction of the Department of Justice." [2] The regulations provided that "[t]he Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions" and promised that "[t]he Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part." *Ibid.*

After Cox's dismissal, a divided Senate Committee on the Judiciary reported alternative bills to reestablish the office with strong statutory guarantees of independence. One measure, introduced by Senator Taft, vested appointment and removal in the Attorney General, but to prevent "unwarranted dismissal" permitted removal "only for neglect of duty, malfeasance in office or violation of this Act" and authorized judicial review of removals.[3] Acting Attorney General Bork advised that the bill "presents no constitutional difficulties that might cast doubt on the legitimacy of the Special Prosecutor's future actions." *Id.* at 25.

Congress determined not to enact special prosecutor legislation to deal with Watergate once Leon Jaworski had been appointed to succeed Cox as special prosecutor under renewed guarantees of independence.[4] Instead, Congress began considering the need for legislation establishing a procedure to be used whenever future circumstances warranted appointment of a special prosecutor. Congress had learned from the Watergate episode that independence for a special prosecutor could be assured only by statute, because a mere promise of independence by the executive is forever subject to rescission at the execu-

[2] 28 C.F.R. § 0.37 (1973), *reprinted in Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., Pt. 1, at 68 (1973) [hereinafter *1973 Senate Hearings*].

[3] S. Rep. No. 596, 93d Cong., 1st Sess. 18, 4 (1973) (reporting S. 2642, 93d Cong., 1st Sess. § 11(a) (1973)). The report explained that "the intent of this subsection is not to subject the Special Prosecutor to removal for marginal transgressions but calls for aggravated circumstances as cause for dismissal." *Id.* at 22.

[4] 28 C.F.R. § 0.37–38 (Nov. 2, 1973), *reprinted in 1973 Senate Hearings*, *supra* note 2, Pt. 1, at 261, 262.

tive's will. This need for a statutory guarantee of independence has remained the consistent assumption underlying Congress's consideration of special prosecutor legislation over the past fifteen years.

Balanced against the need for independence was Congress's concern to respect and accommodate the executive branch's preeminent role in law enforcement. Early on, Congress set aside a legislative proposal to "insulate[]" the conduct of law enforcement functions "from the direct political control of the executive branch" by transforming the Department of Justice into an independent agency.[5] Congress focused instead on measures to establish a special prosecutor to handle cases only where the normal prosecutorial apparatus was impaired by a pervasive conflict of interest.

The various proposals all included provisions to ensure the independence necessary for the special prosecutor to serve free from unwarranted interference. One proposal would have created a Public Attorney wholly independent of the executive and removable only by a special court for gross improprieties.[6] Another provided even greater independence by including no provision for removal before the expiration of a statutory term.[7] After a two-year study, in 1976 a special committee of the American Bar Association reported recommendations to Congress against the background of these proposals. The chairman of the Bar committee testified that "[t]he question of removal hinges on balancing the need for inde-

[5] S. 2803, 93d Cong., 1st Sess. § 1 (1973), *reprinted in Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 249, 250 (1974) [hereinafter *1974 Senate Hearings*].

[6] *See Final Report of the Select Committee on Presidential Campaign Activities*, S. Rep. No. 981, 93d Cong., 2d Sess. 99–100 (1974).

[7] S. 495, 94th Cong., 1st Sess. (1975) (as introduced), *reprinted in Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess., Pt. 1, at 159 (1975) [hereinafter *1975 Senate Hearings*].

pendence and accountability." [8] Fearing that removal by the courts, in which the committee recommended that appointment power be vested, "might imply some degree of supervision by the court over the special prosecutor's activities, thus raising questions of prosecutorial discretion," *id.* at 360, the committee advised "that the power to remove must remain in the hands of the Attorney General." *Id.* at 366. However, the committee recognized that "[r]emoval by the Attorney General would contradict the purposes to be served by the appointment unless stringent qualifications were placed on the removal power." *Id.* at 365-66. Accordingly, it recommended that "the statute should provide that removal occur only after . . . 'extraordinary improprieties,'" *id.* at 366, "which would justify removal where appropriate but would not permit the Attorney General to remove a temporary special prosecutor without the fullest deliberation." *Id.* at 165.

The Senate Committee on Government Operations followed the ABA's guidance and reported legislation establishing a special prosecutor appointed by the Attorney General or the court, depending on the circumstances, but in either case removable only by the Attorney General for "extraordinary impropriety," the standard that Attorney General Richardson had initially promulgated in the Watergate regulations. S. Rep. No. 823, 94th Cong., 2d Sess. 45, 96 (1976) (reporting S. 495, § 595(d)(2)). President Ford and Attorney General Edward Levi proposed an alternative bill that vested appointment in the President with the advice and consent of the Senate, but sought to assure independence by providing that "[t]he grounds for removal of a Special Prosecutor should be, and to the maximum extent permitted by the Constitution shall be, limited to those which constitute extraordinary impropriety." 122 Cong. Rec. 23049 (1976). Senators Ribicoff and Percy forged a compromise, which the Senate passed 91-5, limiting the grounds for removal of the special prosecutor by the President to "extraordinary improprieties, malfeasance in office, or . . . any conduct constituting a felony." *Id.* at 23054. Senator Percy explained,

> The committee has lowered the standard for removal in an effort to insure that no special prosecutor would become a law unto himself. While independence from the President and the Attorney General would be absolutely necessary in the handling of the sensitive cases before him, the special prosecutor must always know that he is ultimately accountable not only to the American people but to the President for serious misconduct in office.

Ibid. Senator Percy emphasized, "What we are trying to get away from is dismissal just because he is too vigilant in exercising the responsibility that he holds. And there we must stand firm, there we want no loopholes." [9]

Statutorily mandated independence for a special prosecutor was finally achieved with the enactment of the Ethics in Government Act of 1978, Pub. L. No. 95-521, Title VI, 92 Stat. 1824, 1867-75. The Act provided that, within the delegated jurisdiction, the special prosecutor would have "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," excepting the Attorney General's wiretap authority. 28 U.S.C. 594(a). The prosecutor's independence was protected by limiting the Attorney General's grounds for removal to "extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties." [10]

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[8] *1975 Senate Hearings, supra* note 7, Pt. 2, at 165 (ABA President-elect Spann).

[9] *Provision for Special Prosecutor: Hearings on H.R. 14476, H.R. 11357, H.R. 11999, H.R. 8281, H.R. 8039, H.R. 15634, and Title I of S. 495 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 17 (1976) [hereinafter *1976 House Hearings*]. The House took no action on the Senate bill.

[10] 28 U.S.C. 596(a)(1) (Supp. V 1981). The Act required any removal to be reported to Congress and the court and provided judicial review to determine whether the removal "was based on error of law or fact." *Id.*, 596(a)(2)-(3).

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The removal provision was designed "to balance the need for independence for a special prosecutor with the desire, for constitutional and other reasons, that the division of the court not be engaged in supervision of the special prosecutor." S. Rep. No. 170, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4216, 4221. As the Senate Committee on Governmental Affairs explained,

> [A] certain degree of supervision is required and the Committee felt it appropriate that this supervision be conducted by the Attorney General, who is a member of the executive branch of the government. However, the special prosecutor was appointed in the first place because of a statutory finding that the Attorney General had a conflict of interest. Therefore, removal can only be accomplished if certain specified causes for removal exist.

Ibid. The Department of Justice agreed that, although "[o]rdinarily Congress may not impose limitations on the Executive's unfettered discretion to remove an Executive official," here "[t]he extraordinary circumstances inherent in the need for resort to a special prosecutor would also justify the restrictions placed on the Executive's power of removal in this instance." [11] On signing the

[11] *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 16–17, 16 (1977) (Ass't Att'y Gen. Harmon). The initial House bill in the 95th Congress had provided for removal of special prosecutors by the court that had appointed them. H.R. 2835, 95th Cong., 1st Sess. (1977) (§ 596). The Department of Justice objected "that the vesting of the removal power in the courts would impose upon them a role inconsistent with their constitutional function. . . . [Removal power] inevitably implies some degree of con'rol or supervision over the Special Prosecutor's activities, a function which may not properly be vested in the courts." *Special Prosecutor Legislation: Hearing on H.R. 2835 and Related Bills Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 20 (1977) [hereinafter *1977 House Hearing*] (Ass't Att'y Gen. Harmon). The House Committee on the Judiciary subsequently reported a bill in accord with the Department's position on removal. H.R. Rep. No. 1307, 95th Cong., 2d Sess. 5 (1978).

Ethics Act into law, President Carter noted that the removal provision "gives the Special Prosecutor in the future, if needed, a great protection in carrying out his responsibilities without interference." 1978–2 Pub. Papers 1855.

Congress has reauthorized the independent counsel law twice since 1978, and both times Congress eased the provision for removal. In 1982, in response to criticism that the "extraordinary impropriety" standard was too stringent and "undefinable," S. Rep. No. 496, 97th Cong., 2d Sess. 17 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 3537, 3553, Congress altered the provision to permit the Attorney General to remove independent counsel "for good cause." Ethics in Government Act Amendments of 1982, Pub. L. No. 97–409, § 6(d), 96 Stat. 2039, 2042, 28 U.S.C. 596(a)(1). The Justice Department testified that a "good cause" standard "would make the special prosecutor no more independent than officers of the many so-called independent agencies in the executive branch and would, in all likelihood, insulate the legislation from constitutional attack in that respect." [12]

More recently, when the law was reauthorized in 1987, Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100–191, 101 Stat. 1293, Congress further altered the removal provision by changing the mechanism for judicial review in two ways. The Act had initially provided for the Special Division of the D.C. Circuit to review removals for "error of law or fact." [13] Congress transferred the jurisdiction to review removals to the district court and eliminated the special review standard. 101 Stat. 1305,

[12] *Ethics in Government Act Amendments of 1982: Hearing Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 7 (1982) (Assoc. Att'y Gen. Giuliani).

[13] 28 U.S.C. 596(a)(3). The House Committee on the Judiciary had explained that the repealed standard gave "the court a greater degree of latitude in overturning a decision to remove a special prosecutor than it ordinarily has in reviewing other similar administrative decisions." H.R. Rep. No. 1307, *supra* note 11, at 11 n.27.

28 U.S.C. 596(a)(3). The transfer of review responded to objections "that it was inappropriate for the appointing authority to also sit in judgment of a dispute over removal." H.R. Rep. No. 316, 100th Cong., 1st Sess. 34 (1987). By transferring jurisdiction to the district court and eliminating the special standard, Congress attempted to make judicial review of an independent counsel's discharge identical to review of the dismissal of any other official with protected tenure.[14]

B. The Constitution Permits the Congress to Guarantee the Independence of Independent Counsel Subject to the Attorney General's Authority to Remove for Cause

One premise of the independent counsel law is that independent counsel must have "full power and independent authority," 28 U.S.C. 594(a), to investigate and prosecute matters within their jurisdiction. This guarantee, which the proponents of both executive and judicial appointment have understood to be essential, mirrors the proposal by President Ford and Attorney General Levi that a "Special Prosecutor shall not be subject to the direction or control of the Attorney General, except as to those matters which by statute specifically require the Attorney General's personal action, approval, or concur-

[14] H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 37 (1987). The court of appeals erred in reviewing the repealed judicial review provision, *see* J.S. App. 54a-56a, rather than the new provision, which took effect while these appeals were under submission before the court. Pub. L. No. 100-191, § 6(b)(2)(F), 101 Stat. 1307-08 (new removal provision applies to investigations pending on date of enactment, Dec. 15, 1987). The court disregarded the amendment in the apparent view that it is the provision that would have governed discharge, if counsel had been removed when she took the actions that underlie appellees' challenge, under which her constitutional status must be evaluated. J.S. App. 53a & n.41. However, it is "here-and-now subservience," *Bowsher* v. *Synar*, 106 S.Ct. 3181, 3186 (1986) (quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)), that motivates consideration of removability. Counsel's "here-and-now subservience" is framed by the only provision under which she may "here and now" be removed. *See* J.S. App. 99a-100a & n.15 (Ginsburg, J., dissenting).

rence." 122 Cong. Rec. 23049 (1976) (§ 593(b)). A second premise is that "no special prosecutor [sh]ould become a law unto himself." *Id.* at 23054 (Sen. Percy). In this part of our brief, we explain why the Congress, with the help of successive administrations, properly concluded that the removal provision in the independent counsel law constitutionally harmonizes the twin predicates of independence and accountability.

1. The Power of the Congress to Prescribe the President's Relation to Particular Executive Duties Depends Upon the Nature of the Duties

This Court has recognized since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that executive officers perform a range of duties and that the President's right to control these duties varies depending upon their nature. Some officers serve as "the political or confidential agents of the executive, merely to execute the will of the president." *Id.* at 166. The Court stated,

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts.

Id. at 165-66. The Court contrasted such political duties with another category of executive duties: "[W]hen the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law." *Id.* at 166.

The nature of an officer's duty controls the officer's relationship to the President in its performance. Because officers performing political duties for the President "act by his authority," *ibid.*, the discharge of these duties "is

under the direction of the president." *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838). However, the Congress may also impose upon an officer statutory duties that "grow out of and are subject to the control of the law, and not to the direction of the president." *Ibid.* In distinguishing between political duties and duties assigned by statute, the Court in *Kendall* rejected the "alarming" proposition "that every officer in every branch of [the executive] department is under the exclusive direction of the president." *Ibid.* "Such a principle, we apprehend, is not, and certainly cannot be claimed by the president." *Ibid.*[15]

The President has greatest control over officers who assist him in "exercis[ing] . . . executive power in the constitutional sense." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935). Chief among these functions are the Constitution's textual commitments to the President to "be Commander in Chief of the Army and Navy," Art. II, sec. 2, cl. 1, to negotiate treaties, Art. II, sec. 2, cl. 2, and to "receive Ambassadors and other public Ministers." Art. II, sec. 3. In fulfilling his constitutional role in national defense and foreign relations, the President "is accountable only to his country in his political character, and to his own conscience." *Marbury*, 5 U.S. at 166.[16]

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[15] The suggestion that the Court in *Marbury* and *Kendall* was describing only ministerial duties in which no discretion is exercised, *see* J.S. App. 26a n.21, is conclusively rebutted by *Butterworth* v. *United States ex rel. Hoe*, 112 U.S. 50 (1884), which addressed whether the Secretary of the Interior had power to revise patent determinations that Congress by law had committed to the judgment of a subordinate official. Rejecting the Attorney General's view, 17 Op. Att'y Gen. 205 (1881), the Court held that the Secretary had no power to control an exercise of administrative discretion confided by Congress in a subordinate officer. 112 U.S. at 66–68. The court of appeals misreads this Court's decisions when it equates the President's political powers with *all* "discretionary or policymaking functions." J.S. App. 26a n.21.

[16] *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (" 'The President is the constitutional representative of the United States with regard to foreign nations. . . . For his conduct he is responsible to the Constitution.' ") (quoting S. Doc. No. 231, 56th Cong., 2d Sess., Pt. 8, at 24); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("Congress cannot deprive the President of the command of the army and navy."); *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (Constitution entrusts to President power to direct military action against belligerents).

Continued

The establishment of the original departments of the executive branch by the First Congress, which "numbered among its leaders those who had been members of the [Constitutional] Convention," *Myers* v. *United States*, 272 U.S. 52, 136 (1926), reflects the early understanding of the President's constitutional prerogative to control officers responsible for these areas. When Congress established the Departments of Foreign Affairs and War, it charged each department's secretary to "perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States" and to "conduct the business of the said department in such manner, as the President of the United States shall from time to time order or instruct."[17] As Representative Vining explained, "The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them." 1 Annals of Cong. 512 (J. Gales ed. 1789); *accord Marbury*, 5 U.S. at 166.

The First Congress's decisions regarding the organization of other executive duties reflect a different view of the President's relation to the officers who performed them. When Congress contemporaneously created the Department of the Treasury, it assigned the secretary specific statutory duties and omitted the open-ended requirement that the Treasury secretary perform duties at the direction of the President.[18] Madison explicated the constitutional principle that underlay the legislative difference among the departments. The secretaries of War and

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[17] Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50; Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29.

[18] Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65.

Foreign Relations were placed under the complete control of the President, because they "were merely to assist him in the performance of duties, which . . . he had an unquestionable right to do [himself] . . . if he were able." 1 Annals of Cong. 614. However, regarding responsibilities of the Treasury Department, such as the comptroller's duty to adjust and settle claims, Madison stated "that the nature of this office differed" and "question[ed] very much whether [the President] can or ought to have any interference." *Ibid.*

The original organization of the prosecutorial function reflects similarly that the First Congress did not equate the President's role in criminal prosecutions with that in war or diplomacy. Unlike the Departments of War, Foreign Affairs, and the Treasury, the First Congress established no department to conduct prosecutions. Instead, Congress created the Attorney General, whom it charged not with general responsibility to direct criminal prosecutions, but only with the "closely contained" [19] duties "to prosecute and conduct all suits *in the Supreme Court* in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments." [20] The Congress assigned the broader duty "to prosecute in [each judicial] district all delinquents for crimes and offences, cognizable under the authority of the United States," not to the Attorney General, but to an officer who "shall be appointed in each district . . . to act as attorney for the United States in such district." *Id.*, 1 Stat. 92. The Attorney General "was not placed in supervisory charge of the [district] attorneys of the United States," who were left "in full possession of cases involving the interests of the United States in the district courts." [21] Thus, the initial

[19] L. White, *The Federalists* 166 (1948).

[20] Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93 (emphasis added).

[21] L. White, *supra* note 19, at 166. The first Attorney General pleaded for statutory authority over the federal government's litigation, Continued

structure devised for law enforcement reflects that neither the First Congress nor the President envisioned a necessary role for the President in supervising all criminal prosecutions.

Subsequent statutory development has established the Attorney General's contemporary unquestioned preeminence in law enforcement. Congress recognized in enacting the Ethics Act that "[t]he responsibility for law enforcement is placed upon the executive branch of the Federal Government," and "[t]he President and the Attorney General must have policy control to make discretionary enforcement decisions." S. Rep. No. 170, *supra* p. 10, at 5. Since 1861, when the Congress first authorized the Attorney General to supervise federal litigation by district attorneys,[22] the Attorney General has become "the hand of the President in taking care that the laws of the United States . . . in the prosecution of offences, be faithfully executed." *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922). But that mid-nineteenth century statutory development does not preclude other statutory prescriptions of the role of the Attorney General, as in the independent counsel law, in the exercise of Congress's authority "to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, sec. 8, cl. 18. The

complaining that "the want of a fixed relation between the attorneys of the districts and the Attorney General, has rendered it impossible for me to take charge of matters on which I was not authorized to give instructions." Letter of Edmund Randolph to President Washington, Dec. 26, 1791, *reprinted in* 1 *American State Papers, Class X, Miscellaneous*, No. 25, at 46 (1834). Washington transmitted Randolph's letter to Congress, *id.* at 45, which failed to enact the legislation sought, *see* 3 Annals of Cong. 329–30 (1791) (proposal that Attorney General be authorized to give binding advice to district attorneys), "and it was . . . seventy [years] before the Attorney General was given supervision and control over the district attorneys." Key, *The Legal Work of the Federal Government*, 25 Va. L. Rev. 165, 176 (1938).

[22] Act of Aug. 2, 1861, ch. 37, 12 Stat. 285 (current version at 28 U.S.C. 519).

Attorney General's role in supervising criminal prosecutions "does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (quoting *Myers*, 272 U.S. at 177 (Holmes, J., dissenting)).

2. The Statutory Grant of Independence May Be Effectuated By Forbidding Removal at Will

Making meaningful the statutory guarantee of independence that "is necessary for the Special Prosecutor to carry out a vigorous and thorough investigation" [23] requires a difference in tenure within the executive branch compared to that of an officer conducting typical prosecutions. This Court first considered the constitutional tie between duties and tenure in *Myers*, 272 U.S. 52. The Court recognized in *Myers* that "[t]he degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act," *id.* at 132, but it nevertheless held that this difference did not affect officers' amenability to discharge. The Court believed that "[t]he imperative reasons requiring an unrestricted power to remove the most important of [the President's] subordinates in their most important duties must . . . control the interpretation of the Constitution as to all appointed by him." *Id.* at 134.

However, "[t]he assumption was short-lived that the . . . President[] [has] inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties." *Wiener* v. *United States*, 357 U.S. 349, 352 (1958). Only nine years after *Myers* the Court unanimously repudiated the President's illimitable right of discharge and held that the nature of an officer's duties controls the officer's constitutional status within the executive branch. *Humphrey's Executor*, 295 U.S. 602. As in *Myers* the Court held in *Humphrey's*

[23] *1973 Senate Hearings*, *supra* note 2, Pt. 1, at 221 (Sen. Taft).

Executor that an officer who "exercises . . . executive power in the constitutional sense" and hence can "be characterized as an arm or an eye of the executive," *id.* at 628, is "inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." *Id.* at 627. But, for those officers who do *not* exercise "executive power in the constitutional sense," the Constitution does not mandate that the President have an unrestricted right of discharge in all cases.[24] The Court held that Congress's power to require officers to "act in discharge of their duties independently of executive control," which "cannot well be doubted," necessitates the ability "to forbid their removal except for cause." 295 U.S. at 629.[25] Limiting presidential removal is, in the Court's words, "an appropriate incident," 295 U.S. at 629, of Congress's power to subject nonpolitical of-

[24] *Humphrey's Executor* cannot be limited to adjudicatory duties. The Court understood that the FTC was responsible for "filling in and administering the details" of the law prohibiting "unfair methods of competition," 295 U.S. at 628, which is an executive, not an adjudicatory, task. Further, as the Court recognized, the FTC had power to initiate cases by "issu[ing] a complaint stating its charges," *id.* at 620, a power much closer to prosecution than adjudication. Although the Court said that the FTC "acts in part quasi-legislatively and in part quasi-judicially," *id.* at 628, the FTC's enforcement powers are "in fact 'executive.'" *Bowsher*, 106 S.Ct. at 3207 n.3 (White, J., dissenting). Independent agencies "share, much as cabinet officers share, in the power granted by Article II to execute the laws." Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae* at 121 n.78, *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

[25] In *Myers* the Court had stated that the President's need to "discharge his own constitutional duty of seeing that the laws be faithfully executed" conferred upon him the power to discharge any officer who he believed had not "intelligently or wisely exercised" his discretion, even an officer who performed duties "specifically committed to [his] discretion" or "of a quasi-judicial character . . ., the discharge of which the President can not in a particular case properly influence or control." 272 U.S. at 135. In *Humphrey's Executor* the Court abandoned this view that limiting removal of such officers to cause "would make it impossible for the President . . . to take care that the laws be faithfully executed." *Id.* at 164.

ficers "to the control of the law, and not to the direction of the president," *Kendall*, 37 U.S. at 610, "[f]or it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 629.

3. The Power to Remove Independent Counsel for Good Cause Enables the Executive Branch to Accomplish Its Constitutionally Assigned Functions

The statutory restriction on dismissal of independent counsel is "at the heart of the statutory mechanisms protecting the independent counsel's ability to act independently of the President's direct control." H.R. Conf. Rep. 452, *supra* note 14, at 37. However, this provision also ensures accountability by enabling the President, through "the personal action of the Attorney General," to remove an independent counsel "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. 596(a).[26]

[26] Congress vested removal authority in the Attorney General rather than the courts to ensure "that the division of the court not be engaged in supervision of the special prosecutor." S. Rep. No. 170, *supra* p. 10, at 73. The court of appeals' attempt, J.S. App. 54a–56a, 82a–83a, to construe the Act as empowering the court to supervise counsel, through either the authority to terminate the office "on its own motion or upon suggestion of the Attorney General," 28 U.S.C. 596(b)(2), or review of counsel's discharge by the Attorney General, *id.*, 596(a)(3), is flatly contrary to Congress's expressed intent. Congress stated plainly that the court's authority to terminate an office was designed to address "the state of the investigation . . . and not the conduct of the special prosecutor" and "should not be interpreted as a substitute for remov[al]." S. Rep. No. 170, *supra* p. 10, at 75. Similarly, judicial review of discharge does not alter the fact that "it is only the authority that can remove" counsel — the Attorney General — "that [s]he must fear." *Bowsher*, 106 S.Ct. at 3188 (quoting *Synar*, 626 F. Supp. at 1401). FTC Commissioner Humphrey's successful challenge of his removal by President Roosevelt does not mean that this Court supervises the FTC.

The removal provision is intended to parallel the standard upheld in *Humphrey's Executor*, under which independent agency officials may be removed "for inefficiency, neglect of duty, or malfeasance in office," [27] and to incorporate case law on removal.[28] There can be no doubt, accordingly, that the provision bars Attorneys General from replacing independent counsel only because they want "their men," *Wiener*, 357 U.S. at 354, and requires Attorneys General to exclude from a removal decision "causes unconnected with the proper administration of the office." *Shurtleff* v. *United States*, 189 U.S. 311, 318 (1903).

The provision provides the President with full means to ensure that independent counsel "faithfully" performs her duties in executing the law. As Attorney General William Wirt explained, under the "Take Care" Clause "[the President is] to see that the officer assigned by law performs his duty *faithfully* — that is, *honestly*: not with perfect correctness of judgment, but *honestly*." [29] Thus,

[27] *E.g.*, 15 U.S.C. 41 (FTC); 49 U.S.C. 1030(c) (ICC). Other statutes simply mandate removal "for cause," *e.g.*, 12 U.S.C. 242 (Federal Reserve Board); 39 U.S.C. 202(a) (U.S. Postal Service), or silently imply a for-cause limitation, as in *Wiener*, *e.g.*, 2 U.S.C. 437c(2)(A) (FEC); 15 U.S.C. 78d (SEC); 47 U.S.C. 154 (FCC). These various statutory formulations have all been understood to impose an equivalent standard for removal.

[28] *See* Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, *Special Prosecutor Provisions of Ethics in Government Act of 1978*, at 54 (Comm. Print 1981). When Congress reauthorized the independent counsel law last year, it reaffirmed its intent that the removal provision match similar statutory provisions. H.R. Conf. Rep. No. 452, *supra* note 14, at 36–37.

[29] 1 Op. Att'y Gen. 624, 626 (1823) (emphasis in original). Wirt gave the example of a statute conferring appointment authority upon the Postmaster General: "If the postmaster shall appoint one applicant while the President prefers another, *the President cannot interfere with the appointment*; because the selection is referred by law to the judgment of the postmaster alone, without any reference to any controlling power in the President." *Ibid.* (emphasis added). Wirt stated that the "Take Care" Clause would permit the President to interfere

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the Clause guarantees the President only "a minimum removal power" to ensure that the "legally designated enforcers act *diligently* and *honestly*; yet even in this case Congress is probably entitled to prescribe a fair procedure for the determination of such questions." [30] By providing authority to discharge independent counsel who are not honest, efficient, and able, Congress has respected the President's constitutional responsibility under the "Take Care" Clause.

Further, although the issue need not be resolved here, the authority to discharge counsel for "good cause" effectuates the President's constitutionally committed functions in war and foreign relations. If the President ever determines that an independent counsel is unacceptably harming the nation's foreign relations or national security, the Act authorizes him in the discharge of his constitutional functions to remove counsel for "good cause." In such circumstances, judicial review of removal would necessarily be circumscribed, for " '[a]s to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.' " [31] Moreover, there is no indication in the text or history of the independent counsel law that the Congress intended to vest in independent counsel or in a reviewing court the power to disregard a presidential determination based on

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only if "the postmaster should make a *corrupt* appointment," because "the laws in such a case have not been faithfully executed" by the postmaster, and the President accordingly "has power to remove him." *Ibid.* (emphasis added).

[30] E. Corwin, *Presidential Power and the Constitution* 111 (1976) (emphasis in original).

[31] *Department of the Navy* v. *Egan*, No. 86-1552, slip op. at 11 (U.S. Feb. 23, 1988) (quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)). Review would need to be searching enough to assure that an assertion of a national security basis for removal was not a pretext to derail a legitimate investigation. *See, e.g.*, S. Rep. No. 981, *supra* note 6, at 37–40 (White House's misuse of CIA to restrict Watergate investigation).

his constitutional authority in military or national security affairs.

Thus, the removal provision does not "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). The Attorney General, who triggers the appointment of independent counsel by determining that there are reasonable grounds to investigate further and who establishes "the markers," J.S. App. 96a (Ginsburg, J., dissenting), for the investigation's jurisdiction, has the power through removal to assure, in Senator Percy's words, that an independent counsel does not "become a law unto himself" and remains "accountable not only to the American people but to the President for serious misconduct in office." 122 Cong. Rec. 23054 (1976).

Neither does the restriction on removal impose any "potential for disruption" of the executive branch beyond that "justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon*, 433 U.S. at 443. Congress enacted the limitation based on its reasonable conclusion that, for an executive officer with no protected tenure to investigate and prosecute high-ranking executive officials, " '[t]he pressures, the divided loyalty are too much for any man.' " S. Rep. No. 170, *supra* p. 10, at 5 (quoting Archibald Cox). As Madison stated,

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51, at 356 (B. Wright ed. 1961). The severe conflict-of-interest problems that attend efforts by the executive branch to enforce adherence of its own highest-ranking officers to the criminal law dictate use of

the "auxiliary precaution" of tenure protection to "oblige [the government] to control itself." Congress's "overriding need to promote," *Nixon*, 433 U.S. at 443, the even-handed administration of justice by overcoming obvious conflicts of interest justifies the minimal intrusion of the limitation on removal.

C. The Court Should Construe the Removal Provision as Necessary to Avoid Constitutional Questions

The legislative history of the removal provision establishes the central meaning of the "good cause" restriction, but leaves a number of questions of potential application intentionally unresolved. The fundamental purpose of the removal provision is "to get away from . . . dismissal just because [an independent counsel] is too vigilant in exercising the responsibility that he holds." *1976 House Hearings*, *supra* note 9, at 17 (Sen. Percy). At first, Congress prescribed a high degree of cause by legislating a standard of "extraordinary improprieties," but, at the recommendation of the Department of Justice in 1981, the standard was amended to "good cause." *See* page 11 *supra*. Nevertheless, the Congress continued to exhort the Attorney General to remove "in only extreme, necessary cases, as removal of a special prosecutor could severely undermine the public confidence in investigations of wrongdoing by public officials." S. Rep. No. 496, *supra* p. 11, at 17. The conference committee on the 1987 reauthorization expressed its understanding that an Attorney General would lack "good cause" to dismiss independent counsel who resist directives that would "violate the integrity of their proceedings." H.R. Conf. Rep. No. 452, *supra* note 14, at 37.

But beyond that central conception of "good cause," the Congress has not sought to resolve in the text of the statute how the standard should be applied in particular cases. As discussed above, Congress drafted the removal provision to parallel similar provisions that the Court has sustained and modified the provision to satisfy expressed concerns to ensure that the provision meets constitutional muster. *See* pages 11-12 *supra*. These efforts highlight Congress's intent to limit the Attorney General's ability to discharge independent counsel only insofar as is consistent with the President's constitutional prerogatives. To the extent that any potential application of the removal provision could create an unavoidable constitutional question, on this facial challenge to the unused removal power the Court should fulfill its "duty to adopt that construction which will save the statute from constitutional infirmity." [32]

The Congress has vested in the Attorney General the first opportunity to construe the provision and to apply it to particular circumstances.[33] It may be that an Attorney General will remove an independent counsel for misconduct that raises no interpretative questions about "good cause." Only if a dispute arises about the reach of the removal provision and judicial review is sought will the Court need to resolve questions about the precise scope of the removal power.[34]

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[32] *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

[33] The power of the Attorney General to construe and implement the removal provision contributes to the "enormous difference . . . insofar as impact upon the balance of powers" between vesting the power to remove for cause in an appointee of the President and "eliminat[ing] *all* presidential power of removal." *Synar*, 626 F. Supp. at 1401 (emphasis in original).

[34] For example, "a *serious* departure from the Department of Justice's policies" could constitute good cause for dismissal, *Amendment of the Special Prosecutor Provisions of Title 28: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 17 (1982) (Assoc. Att'y Gen. Giuliani) (emphasis added), but *every* failure to follow Department policies would *not* constitute good cause. *See* S. Rep. No. 496, *supra* p. 11, at 16 (responding to earlier Department of Justice description of removal power).

Another potential dispute would be whether the Attorney General has power to dismiss for good cause for refusal to follow every presi-

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II.

THE ACT CONSTITUTIONALLY VESTS THE AUTHORITY TO APPOINT INDEPENDENT COUNSEL IN THE COURT

In order to assure an "impartial appointment," H.R. Rep. No. 1307, *supra* note 11, at 4, of independent counsel, and in accord with "the fundamental principle that no man can be a prosecutor or judge in his own case," S. Rep. No. 170, *supra* p. 10, at 5, the Congress provided for the appointment of counsel by a court under the authority of the Appointments Clause. In part A of this section we describe the legislative history of Congress's determination that no other means of appointment could as well serve the objectives of the law. In part B we explain Congress's justifiable reliance on the text of the Appointments Clause, and on this Court's prior construction of it in *Ex Parte Siebold*, in exercising the Congress's constitutional authority by law to delegate this limited but critical responsibility to the court.

A. Congress Determined That Court Appointment of Independent Counsel Is Necessary to Achieve the Purposes of the Act

Three basic issues framed the debate over legislation to appoint a special prosecutor: first, whether there should be a general legislative solution or reliance on ad hoc efforts each time a conflict of interest threatens to undermine public confidence in an investigation of alleged criminal conduct within the executive branch; second, if a statutory solution was needed, whether Congress should

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dential direction. *Compare Oversight of the Independent Counsel Statute: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 430 (1987) (Ass't Att'y Gen. Bolton) ("prosecutor must comply with the President's direction of his discretion [to grant immunity] on pain of dismissal") *with* H.R. Conf. Rep. No. 452, *supra* note 14, at 37 (resisting "orders to grant unwarranted prosecutorial immunity to the targets of the independent counsel's criminal investigation" not good cause for removal).

establish a permanently staffed office or an office to be filled only when future events triggered the need; and third, how should either a permanent or a temporary special prosecutor be appointed.

Congress decided from the outset that a long-term statutory solution was necessary. The Senate Watergate Committee warned against "wait[ing] until another national crisis to re-institute the Office of Special Prosecutor. It is far better to create a permanent institution now than to consider its wisdom at some future time when emotions may be high and unknown political factors at play." S. Rep. No. 981, *supra* note 6, at 96-97. The special ABA committee agreed that "[t]he issue is not whether a special prosecutor is needed, but rather how, under what circumstances, under what authority, and at what time a special prosecutor should be activated." *1975 Senate Hearings, supra* note 7, Pt. 2, at 360. Examining Teapot Dome and Watergate, the committee concluded that "[h]istory should have taught us that the existing system permits situations to develop, extreme situations which mandate the ad hoc appointment of a special prosecutor long after one should have been appointed." *Ibid.*

In the case of Teapot Dome, special counsel were appointed only after years of public allegations and congressional investigation, a change in administration upon President Harding's death, and enactment of a special statute.[35] During the tax corruption scandal of the Truman Administration, Attorney General J. Howard McGrath appointed Newbold Morris as a special assistant to investigate executive branch corruption. Wash. Post, Feb. 2, 1952, at 1. However, Morris was charged only to

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[35] Act of Feb. 8, 1924, ch. 16, 43 Stat. 5. Even then, the criminal prosecutions that eventually occurred were only one product of Congress's purpose in enacting a statute to require the government to initiate civil litigation to cancel the corruptly obtained oil leases. Act of Feb. 27, 1924, ch. 42, 43 Stat. 16; *see Pan American Petroleum & Transport Co.* v. *United States*, 273 U.S. 456, 491-92 (1927).

investigate and to recommend, not to prosecute.[36] Further, notwithstanding a promise of complete independence, Morris was fired by McGrath two months into his investigation for submitting financial questionnaires to Department of Justice officials and insisting on access to Department of Justice files. Wash. Post, Apr. 4, 1952, at 1. President Truman then fired McGrath, *ibid.*, but no new special investigator was appointed.[37]

Finally, the appointment of a special prosecutor in Watergate resulted largely from the coincident timing of Elliot Richardson's confirmation hearings as Attorney General, at which Richardson agreed to appoint a special prosecutor.[38] Richardson promised that he would resign as Attorney General if he were directed to discharge the special prosecutor "in the absence of some overwhelming evidence of cause." *Id.* at 72. After Richardson was so directed, he and his deputy did resign rather than carry out the President's order. The special prosecutor was then fired, and after a nationwide storm of protest a new prosecutor was appointed. Based on this tumultuous history of ad hoc approaches to investigations of executive

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[36] N. Morris, *Let the Chips Fall* 8 (1955) (reprinting letter of appointment).

[37] Congress's efforts to legislate terms of the investigation were not successful. Legislation was introduced at President Truman's request to grant Morris subpoena and immunization powers. 98 Cong. Rec. 975, 988, 1020, 1105, 1175 (1952). Wary of immunity and of an investigator appointed by the Attorney General, the judiciary committees of both Houses rejected the requests and reported substitute legislation to authorize a new special investigator with subpoena power to be appointed by the President with Senate confirmation. S. Rep. No. 1339, 82d Cong., 2d Sess. (1952); H.J. Res. 410, 82d Cong., 2d Sess. (1952). The Senate agreed to the substitute measure on July 3, after Morris had been fired, but the House did not act on it. 98 Cong. Rec. 9055 (1952). Congress's failure to enact a legislative charter for the investigation illustrates the difficulty faced by ad hoc legislative attempts to deal with a particular investigation.

[38] *Nomination of Elliot L. Richardson To Be Attorney General: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 4 (1973).

branch wrongdoing, Congress determined that a statutory system was necessary.

Attention initially focused on establishing a permanent office to investigate and prosecute as matters arose. The Senate Watergate Committee recommended an office of Public Attorney, headed by an officer with a five-year term, to handle all criminal cases in which the executive branch had a conflict. S. Rep. No. 981, *supra* note 6, at 96-97. Many commentators questioned, however, the wisdom of a permanently staffed office, objecting that the most able prosecutors would not accept an appointment under which they might never receive an assignment and that a permanent office would pose too great a risk of abuse and unnecessary interference with the Department of Justice.[39] The ABA committee recommended against a permanent office based on these concerns and proposed a statute "which would require the Attorney General to consider appointing a special prosecutor in accordance with statutory guidelines." *Id.*, Pt. 2, at 362. The House of Representatives shared the "concern about insuring adequate accountability for a permanent special prosecutor." H.R. Rep. No. 1307, *supra* note 11, at 3-4. Accordingly, the Ninety-fifth Congress turned away from a permanent office and focused on "a mechanism for the appointment of an independent special prosecutor on a temporary and ad hoc basis. Such a mechanism would be available when needed, avoiding both the necessity to trust to luck and the drawbacks of a permanent special prosecutor." *Id.* at 4.

The primary unsettled issue was how to appoint a temporary special prosecutor. Authority to appoint a permanent prosecutor could have been vested in the President with the Senate's advice and consent. On a case-by-case

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[39] *See, e.g., 1974 Senate Hearings*, *supra* note 5, at 121 (Prof. Burke Marshall); *id.* at 201 (Spec. Pros'r Archibald Cox); *1975 Senate Hearings*, *supra* note 7, Pt. 1, at 104 (Spec. Pros'r Leon Jaworski); *id.* at 120-21 (Spec. Pros'r Henry Ruth); *id.* at 238-39 (Erwin Griswold); *id.* at 262 (Philip Lacovara).

basis, however, presidential appointment with confirmation would likely be too protracted and partisan to accomplish the purpose intended by the statute and would preclude confidential investigations of nonpublic allegations. Accordingly, the two appointment methods that were considered most extensively were appointment by the Attorney General, or by a court, upon the Attorney General's application.

The constitutionality of vesting appointment authority in the courts was the subject of extended scholarly debate. Some participants, including Senator Baker and Attorney General Levi, believed court appointment raised constitutional questions;[40] others, such as Professors Paul Freund and Paul Bator, endorsed judicial appointment based on the text of the Appointments Clause, Art. II, sec. 2, cl. 2, and this Court's construction of the Clause in *Ex Parte Siebold*, 100 U.S. 371 (1880).[41] The ABA committee reported that its "research and discussion have convinced all its members that who appoints a special prosecutor is a question of policy for Congress to decide. The Committee concludes that the Constitution and case law thereunder authorizes court appointment of a special prosecutor." [42]

The ultimate enactment of judicial appointment resulted from a critical evolution in the thinking of the Department of Justice. In 1977, for the first time the Justice De-

[40] *1975 Senate Hearings*, *supra* note 7, Pt. 1, at 23 (Baker); *1976 House Hearings*, *supra* note 9, at 34 (Levi).

[41] *See, e.g., 1973 Senate Hearings*, *supra* note 2, Pt. 1, at 365 (Freund) (terming court appointment "a question of unusual clarity in its resolution because of the special language of article II"); *id.*, Pt. 2, at 557–64 (Prof. Stephen Breyer & Philip Heymann); *Special Prosecutor and Watergate Grand Jury Legislation: Hearings on H.J. Res. 784 & H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 334 (1973) (Bator); *id.* at 205–08 (Prof. Gerhard Casper); *id.* at 215 (Prof. Paul Mishkin).

[42] *1975 Senate Hearings*, *supra* note 7, Pt. 2, at 361. The committee proposed appointment by the Attorney General or, if he failed to act, by a special court of three retired circuit judges. *Id.* at 362–63.

partment endorsed the constitutionality of court appointments.[43] Although it adhered to its historical view that under the separation of powers the Appointments Clause "would generally require that the Executive be allowed to appoint those officials carrying out Executive functions," the Justice Department told Congress that court appointment was constitutionally "justified by . . . the extraordinary circumstances which would mandate recourse to a special prosecutor." *Id.* at 21, 20. Pointing to "the circumstances surrounding misconduct by high-level officials and the need to preserve the appearance as well as the substance of justice," the Department concluded based on *Siebold* that "[i]n such exceptional circumstances we do not believe that an 'incongruous' duty would be imposed upon the courts." *Id.* at 21.

After years of careful study, Congress vested authority to appoint independent counsel in the Special Division of the court, upon application of the Attorney General only, 28 U.S.C. 593(b), in the belief that judicial appointment is the best way to ensure an "impartial appointment." H.R. Rep. No. 1307, *supra* note 11, at 4. As the Senate Committee on Governmental Affairs explained, "[t]he President and the Attorney General must have policy control to make discretionary enforcement decisions," but "where the alleged criminal conduct of high-level administration officials is involved, this argument must bow to the fundamental principle that no man can be a prosecutor or judge in his own case." S. Rep. No. 170, *supra* p. 10, at 5.

B. The Appointments Cause Permits Judicial Appointment in the Limited Circumstances of the Ethics Act

The direct evidence of the constitutionality of judicial appointment of independent counsel is the text of the Constitution, which provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts

[43] *1977 House Hearing*, *supra* note 11, at 18–23 (Ass't Att'y Gen. Harmon).

of Law, or in the Heads of Departments." Art. II, sec. 2, cl. 2. The challenge to the appointment rests on the view, which the court of appeals adopted, that, notwithstanding its absence from the Clause, a limitation should be read into the constitutional language to restrict courts' authority to make appointments solely to judicial officers. To reach this result the court of appeals concluded, first, that the Framers' intent was narrower than the language they drafted, and, second, that this Court's holding in *Ex Parte Siebold* is narrower than it purported to be. We show below that neither effort to narrow the Clause is supportable. Judicial appointment of independent counsel is fully consistent with the intent of the Framers that appears from the Convention and with this Court's understanding of the Clause in *Siebold*.

1. *The Framers' Intent Supports the Plain Textual Meaning of the Appointments Clause*

The evolution of the Appointments Clause at the Convention supports the clear import of the Clause's text that substantial discretion was given to the Congress to widen the allocation of appointment authority, including by assigning appointment responsibilities to the judiciary. Through most of the Convention, the delegates intended to vest in the Senate the authority to appoint judges, on whom they focused principally.[44] The Convention repeatedly rejected proposals to transfer the authority to appoint judges from the Senate to the executive.[45] The

[44] Edmund Randolph's resolutions to the Convention initially proposed that judges be appointed by the full legislature. *See* 1 *The Records of the Federal Convention of 1787*, at 21-22 (M. Farrand ed. 1966). At Madison's urging, the Convention substituted appointment by the Senate. *Id.* at 232-33.

[45] The Convention defeated motions to transfer appointment to the executive (1) alone, 2 *id.* at 44; (2) by and with the advice and consent of the Senate, *ibid.*, and (3) unless disagreed to by a majority, or by two-thirds, of the Senate, *id.* at 82-83.

The court of appeals' failure to appreciate the Framers' intent to vest appointment authority in the Senate for most of the Convention

Continued

Framers set out to balance Senate appointment of judges with executive authority to appoint "to offices in cases not otherwise provided for." *Id.* at 23. When the Committee of Detail reported a draft of the Constitution on August 6, it retained Senate appointment of Supreme Court judges, added Senate appointment of ambassadors, and provided that the executive should "appoint officers in all cases not otherwise provided for by this Constitution." *Id.* at 185. As the Convention debated the Committee's plan in late August, some delegates objected to any appointments by the Senate,[46] some thought that the legislature should appoint other executive officers as well as ambassadors and judges,[47] and others opposed giving the executive residual authority to appoint all officers not otherwise provided for.[48] The Convention overrode these objections and retained the division between Senate and executive appointment reported by the Committee.

Then, on September 4, when the Committee of Eleven reported to the Convention, it proposed a different plan providing that the President "shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the [United States], whose appointments are not otherwise herein

contributed to its misunderstanding of the Appointments Clause. For example, the court described John Dickinson's proposal to allow appointment authority to be vested in state governments as having been rejected as a "putative encroachment on the President's power." J.S. App. 32a. At the time Dickinson's proposal was rejected, however, the proposed authority to appoint judges and ambassadors was located in the Senate, not the President. *See* 2 Farrand at 389, 406. The proposal was rejected as an encroachment on the federal government, not on the President.

[46] *See, e.g., id.* at 389 (Gouverneur Morris & James Wilson).

[47] *See, e.g., id.* at 329 ("Mr. Dickenson urged that the great appointments should be made by the Legislature, in which case they might properly be consulted by the Executive — but not if made by the Executive himself.").

[48] *Id.* at 405 (Roger Sherman).

provided for." [49] With little discussion, the Convention agreed to the new plan and referred it to the Committee of Style for inclusion in the Constitution.[50] Changing only punctuation, the Committee of Style reported the current language of the first portion of the Appointments Clause to the Convention. *Id.* at 599, 627. Gouverneur Morris then moved to annex to the Clause an alternative mechanism to permit the Congress "by law [to] vest the appointment of such inferior Officers as they think proper, in the President alone, in the Courts of law, or in the heads of Departments." *Id.* at 627. There was only one recorded exchange on the proposal, between Morris and Madison, who saw it as unnecessary.[51] After the vote on the annexation failed by an equal division, "[i]t was urged that it be put a second time, some such provision being too necessary, to be omitted. and on a second question it was agreed to nem. con." *Id.* at 627-28.

The sparse recorded discussion of the addition of the alternative appointment mechanism to the Clause frustrates the attempt to divine an intent other than that conveyed by the text itself. The assumption in which the court of appeals indulged, J.S. App. 33a, that because the alternative language was added near the end of the Convention with little discussion, it lacked sufficient controversy to have been intended to vest the discretion in Congress that it plainly states that it does, is unpersuasive.[52]

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[49] *Id.* at 498-99. This plan was similar to earlier proposals by Madison and Nathaniel Gorham, which the Convention had rejected. *See id.* at 43-44, 80-83.

[50] *Id.* at 539-40, 553. The only change that the Convention made was to add "consuls" to the list of officers. *Id.* at 539.

[51] Madison objected, "It does not go far enough if it be necessary at all — Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." Morris responded, "There is no necessity. Blank Commissions can be sent—." *Ibid.*

[52] The court of appeals attempted to link the alternative mechanism to an unrelated remark by Rufus King. The week before the change was made, George Mason had suggested that officers other than ambassadors be appointed by the President with the concurrence of a

Continued

Only days earlier the Convention had shifted the power to appoint judges and ambassadors from the Senate to the President. *Id.* at 538-39. Notwithstanding the fact that this change concerned the most controversial appointments issue at the Convention and reversed the decision that the delegates had adhered to throughout the Convention, this change, too, generated little recorded discussion. *Ibid.* The reason for the brevity of the discussion on this change is that it was not made on the Convention floor, but was a "compromise . . . effected in [the Committee of Eleven], in which Gouverneur Morris of Pennsylvania represented the larger States and Roger Sherman the smaller States." *Myers*, 272 U.S. at 111.

Then, days later, the Convention annexed to the new appointment provision the alternative appointment mechanism, with little discussion, on a motion made by Morris and seconded by Sherman, 2 Farrand at 627, who had just engineered the appointments compromise between the larger and smaller states. Throughout the Convention Morris had advocated executive appointment. He had unsuccessfully proposed that the Constitution establish a Council of State to advise the President, composed of the Chief Justice of the Supreme Court and secretaries of Domestic Affairs, Commerce and Finance, Foreign Affairs, War, the Marine, and State. *Id.* at 342-43. Morris had contended that the executive should appoint these "min-

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council of senators, rather than the full Senate, because he "considered the Senate as too unwieldy & expensive for appointing officers, especially the smallest, such as tide waiters &c." 2 Farrand at 537-38. Opposing Mason's proposal, King had responded that "[h]e did not suppose it was meant that all the minute officers were to be appointed by the Senate, or any other original source, but by the higher officers of the departments to which they belong." *Id.* at 539. There is no evidence linking this exchange with the subsequent adoption of the alternative appointment mechanism. No delegate was recorded as having shared Mason's concern, and both Morris and Madison, who spoke on the subsequent change, appear to have held King's view that the first portion of the Clause was not intended to bar delegating the appointment of low-level officers. *Id.* at 627.

isterial officers for the administration of public affairs," whom he called "great officers of State." [53]

Sherman, on the other hand, had opposed universal executive appointment. He had "admitted it to be proper that many officers in the Executive Department should be so appointed — but contended that many ought not, as general officers in the Army in time of peace &c. Herein lay the corruption in G. Britain." *Id.* at 405. Sherman had proposed, also unsuccessfully, that Congress be authorized to provide by law for appointment otherwise than by the President.[54] Thus, the alternative appointment mechanism brought together delegates who were at opposite poles of thought on the appointment of executive officers. The alternative mechanism served the goals of delegates from large states represented by Morris because it permitted the vesting of appointment authority "in the President alone," which they preferred to Senate confirmation. By authorizing Congress to enact legislation vesting appointing authority of executive officers in "the Courts of Law, or . . . the Heads of Departments," it also served the goals of Sherman's followers from small states because it gave Congress some of the appointments flexibility that they had sought. Neither Morris's nor Sherman's proposal had been adopted by the Convention earlier, when authority to appoint judges and ambassadors had been vested in the Senate and authority to appoint other officers in the President. However, once the Convention had decided that officers in both categories would be appointed by the President with Senate confirmation, the delegates agreed to permit Congress to provide by law

[53] *Id.* at 32, 33. Morris also favored executive appointment of judges. *Ibid.* He "argued agst. the appointment of officers by the Senate. He considered the body as too numerous for the purpose; as subject to cabal; and as devoid of responsibility." *Id.* at 389.

[54] Sherman had moved that the words "or by law" be added at the end of the sentence providing that the President "shall appoint officers in all cases not otherwise provided for by this Constitution." *Ibid.*

for alternative appointment methods that excluded both the President and the Senate.[55]

The breadth of the alternative appointment mechanism attracted favorable public attention during the ratification debates. The leading Anti-Federalist pamphlets during ratification, circulated under the name *Letters from the Federal Farmer*, specifically addressed the flexibility that the alternative mechanism gave to Congress to shift the power of appointment "by placing many of the inferior appointments in the courts of law, and heads of departments." [56] The pamphlet explained that "[t]his power of distributing appointments, as circumstances may require, into several hands, in a well formed disinterested legislature, might be of essential service, not only in promoting beneficial appointments, but, also, in preserving the balance in government." *Ibid.* Thus, the Appointments Clause was understood when the Constitution was ratified to authorize Congress to vest appointment authority in the courts when necessary "in preserving the balance in government."

2. *This Court's Decision in Ex Parte Siebold Provides Firm Support for Court Appointment of Independent Counsel*

a. The Election Supervisors in Siebold Enforced the Law

This Court has previously held that the alternative mechanism in the Appointments Clause empowers Congress to vest authority to appoint executive officers in the courts. *Ex Parte Siebold*, 100 U.S. 371, presented a challenge by defendants convicted of violating the federal En-

[55] This amendment may have been more attractive than Sherman's original proposal because, by limiting alternative means of appointment to the President, the Courts, and Heads of Departments, it barred other appointing entities, such as Congress or state governments, which the Convention opposed. *See id.* at 406.

[56] Letters from the Federal Farmer to the Republican, No. 14, Jan. 17, 1788, *reprinted in* 4 *The Founders' Constitution* 98 (P. Kurland & R. Lerner eds. 1987).

forcement Acts, which were enacted during Reconstruction to enforce civil voting rights in federal elections.[57] To enforce the Fifteenth Amendment and prevent fraud in congressional elections, the Acts created federal "supervisors of election" to police voter registration, balloting, and vote counting.[58] Congress vested the authority to appoint the election supervisors in federal circuit judges in circuits where residents had expressed "their desire to have such registration or election guarded and scrutinized." [59]

The defendants in *Siebold* had been convicted of violating provisions of the Acts making it unlawful for state election officials to engage in election fraud in violation of state or federal law or for anyone to interfere with the federal election supervisors in the performance of their duties.[60] They challenged the Acts' constitutionality on the grounds (1) that Congress could not regulate elections by supplementing state laws with federal penalties, and (2) that interference with the federal supervisors could not be punished, because the supervisors had been appointed improperly by the courts.

On their second point of challenge, the defendants contended that the supervisors' duties were "entirely executive in their character" and "that no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government." 100 U.S. at 397. The Court rejected the claim and relied on the alternative mechanism in the Appointments Clause to hold that "Congress had the power to vest the appointment of the supervisors in question in the circuit courts." *Id.* at 398. The Court

[57] Act of May 31, 1870, ch. 114, 16 Stat. 140–46; Act of July 14, 1870, ch. 254, § 5, 16 Stat. 254, 255–56, *as amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433–40.

[58] Act of Feb. 28, 1871, §§ 2, 4–5, 16 Stat. 433–35, *quoted in Siebold*, 100 U.S. at 379–80.

[59] *Id.*, § 2, 16 Stat. 433–34, *quoted in Siebold*, 100 U.S. at 379.

[60] *Id.*, § 10, 16 Stat. 436–37, *quoted in Siebold*, 100 U.S. at 381; Act of May 31, 1870, § 22, 16 Stat. 145–46.

explained that, although "[i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain, . . . *there is no absolute requirement to this effect in the Constitution.*" *Id.* at 397 (emphasis added).

Instead of absolutely prohibiting "cross-branch" appointments, the Court adopted a more flexible and subtle approach. It held that generally "the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress." *Id.* at 397–98.[61] Congress's exercise of discretion, the Court held, may be vitiated by the courts only if Congress's selection entails "such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void." 100 U.S. at 398. The Court found no "incongruity" in the courts' appointing election supervisors, because,

> It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither

[61] The "functionaries" the Court was referring to are the entities named in the alternative mechanism in the Appointments Clause: the President, the Courts of Law, and the Heads of Departments. Underlying the Court's ruling was its view that "if there were" a per se rule, "it would be difficult in many cases to determine to which department an office properly belonged," citing marshals as one example. *Id.* at 397. The Court suggested that the Framers had eschewed requiring such determinations to spare "harrass[ment] by the endless controversies to which a more specific direction on this subject might have given rise." *Id.* at 398. Justice Story earlier made the same point that "[t]he propriety of this discretionary power in congress, to some extent, cannot well be questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to congress to act according to the lights of experience." J. Story, *Commentaries on the Constitution of the United States*, § 793, at 566 (reprinted ed. 1987).

> the President, nor any head of department, could have been equally competent to the task.

Ibid.

The court of appeals erroneously dismissed *Siebold* based upon its misperception of the duties of the election supervisors whose appointments the Court upheld there. The court of appeals persuaded itself that the officers were merely election observers and identified the Enforcement Acts as an exercise of Congress's power to judge the elections of its members.[62] Because Congress had vested authority in the courts to appoint only "officials charged with tasks the Constitution assigns to Congress itself," the court reasoned, "Congress presumably could have chosen any method of appointing such officials, including vesting the appointment power in itself." J.S. App. 36a-37a.

In its effort to dispose of *Siebold*, the court of appeals dramatically rewrote the history of the nation's struggle during Reconstruction for voting rights. The Enforcement Acts were precisely what their titles suggest: laws to *enforce* the right to vote guaranteed by the Constitution. Congress established election supervisors to do precisely what their titles suggest: to *supervise* elections to safeguard the right to vote. As part of their duties, the supervisors were charged with superintending all aspects of the voter registration process. They were directed "to attend at all times and places fixed for the registration of voters . . . and to challenge any person offering to register; to attend at all times and places when the names of registered voters may be marked for challenge, and to cause such names registered as they shall deem proper to be so marked," to "cause the names of those upon any such list whose right to register or vote shall be honestly doubted to be verified by proper inquiry and examination at the respective places by them assigned as their residences," to "prevent fraudulent registration," and "to

[62] "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members." Art. I, sec. 5, cl. 1.

personally inspect and scrutinize such registry" to "detect and expose the improper or wrongful removal therefrom, or addition thereto, in any way, of any name or names." [63] In short, the federal supervisors were assigned the duties routinely performed by a registrar of voters.[64] The supervisors' enforcement role during balloting was equally explicit. They were charged

> to attend at all times and places for holding elections . . . and for counting the votes cast at said elections; to challenge any vote offered by any person whose legal qualifications the supervisors, or either of them, shall doubt; . . . to personally inspect and scrutinize . . . the manner in which the voting is done, and the way and method in which the poll-books, registry-lists, and tallies or check-books . . . are kept; . . . to personally scrutinize, count, and canvass each and every ballot; . . . [and to] prevent . . . fraudulent voting . . . or fraudulent conduct on the part of any officer of election.[65]

Congress had no doubt when it enacted the Enforcement Acts about the role it intended the federal supervisors to play in the electoral process. The central legislative determination underlying the enactments was that direct federal supervision over the electoral process was necessary to enforce the right to vote guaranteed by the Fifteenth Amendment. Based on documented voting abuses in much of the country,[66] the Congress concluded

[63] Act of Feb. 28, 1871, §§ 4, 8, 13, 16 Stat. 434, 436, 438.

[64] *Cf.* 42 U.S.C. 1973d-1973e (duties of federal voting examiners under Voting Rights Act of 1965).

[65] Act of Feb. 28, 1871, §§ 5, 8, 16 Stat. 434-35, 436. The Act, to be sure, also directed the supervisors to report, through chief supervisors, to Congress on any interference with the performance of their duties. *Id.*, § 7, 16 Stat. 435-36. This reporting responsibility does not mean that the supervisors were mere observers but represents Congress's determination to ensure that the supervisors' enforcement was not disrupted.

[66] The outrages that led to the Enforcement Acts are described in A. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* 383-87 (1971).

that "the State laws have not protected the citizens of the southern States against violence, and have not protected the citizens against fraud and force and wrong in more than one of the cities of the northern States." Cong. Globe, 41st Cong., 3d Sess. 1276 (1871) (Rep. Churchill). Congress enacted the Enforcement Acts to fulfill its "highest duty . . . to intervene and protect the citizens of the United States in the enjoyment of the elective franchise against force and fraud." *Ibid.*

A key element of Congress's program was the federal supervisors, whose mission was to "participate in conducting the election, simply to the end that there may be fair play and the enjoyment of equal rights under the laws of the State." *Id.* at 1284 (Rep. Bingham). Opposition to the legislation focused on the active enforcement role of the election supervisors. Representative Eldridge objected that it permitted the federal government, through the supervisors and auxiliary officers, to "take possession of the registration as well as the elections of the States, determine who is qualified and who not qualified, who shall and who shall not register, to the exclusion of all State authority." *Id.* at 1272. Opposition in the Senate was similarly based on the law's authorization of the federal supervisors "to interfere directly in the elections," *id.* at 1651 (Sen. Casserly), and to "assume[] the power of the General Government to superintend and regulate registrations and elections." *Id.* at 1633 (Sen. Vickers). The legislative history leaves no doubt that it was the purpose of the Enforcement Acts to give federal supervisors "powers over the ballots of the people who are to vote." *Id.* at 1642–43 (Sen. Hill).

The extensive enforcement role actually performed by the federal supervisors is similarly well-documented. In the election of 1876, for example, in New York City, the supervisors assembled voter registration lists and "went from house to house with the lists, for the age of a voter, his residence, and other matters, so as to identify him and estop fraud. . . . When all the reports agreed that

the man did not live at the place, . . . arrests were ordered." H.R. Rep. No. 218, 44th Cong., 2d Sess. 3 (1877). A House committee studying the efficacy of the federal supervisors concluded,

> More care could not have been taken . . . for the verification of the registry and the purity of the election. . . . From the moment the supervisors are appointed, from the moment that the lists are purged, from the moment that the applications are examined, to the very last return of the popular expression, this election shows the calm mastery of prudence.[67]

Nor can there be any doubt about this Court's understanding of the federal supervisors' responsibility "for superintending the election," *Siebold*, 100 U.S. at 386, and not merely observing it. The Court appreciated that the supervisors were a "means of supervision in order more effectually to secure [state officers'] performance" of their duties. *Id.* at 388. Justice Field described the supervisors' duty as "to supervise the action of the State officers from the registration of voters down to the close of the polls on the day of election." [68]

In straining to construe the election supervisors as observers whose duties "Congress might delegate to one of its own committees," J.A. App. 37a, the court of appeals overlooked the main point of the controversy in *Siebold*. In addition to their Appointments Clause claim, the defendants had argued that Congress cannot regulate elections jointly with states, but must regulate them exclusively or not at all. The Court rejected this claim based on its interpretation of Art. I, sec. 4, cl. 1, which delegates

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[67] *Id.* at 4–5. The Enforcement Acts were less successful in the South. *See* Swinney, *Enforcing the Fifteenth Amendment, 1870–1877*, 28 J. S. Hist. 202 (1962).

[68] *Ex Parte Clarke*, 100 U.S. 399, 407 (1880) (Field, J., dissenting) (companion case). Justice Field dissented precisely because of his belief "that it is not competent for Congress . . . to subject [a State officer] in the performance of [his] duties to the supervision and control of others." *Id.* at 408.

to Congress power "by Law [to] make or alter [States'] Regulations" for "[t]he Time, Places and Manner of holding Elections for Senators and Representatives." *See Siebold*, 100 U.S. at 383. The Court unquestionably believed that Congress's power to regulate elections under Art. I, sec. 4 was the constitutional underpinning for the enactments.[69] Thus, when this Court decided *Siebold*, it fully appreciated that Congress was regulating the conduct of elections and that it had created federal supervisors to execute the regulations. It is simply not credible to maintain the contrary.

b. Independent Counsel Meet This Court's Test for Judicial Appointment

Siebold, therefore, provides strong support for judicial appointment of independent counsel. As in *Siebold*, appointment by the courts is not "incongruous" because the task of appointing counsel could not "with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it." 100 U.S. at 398. Given the statute's central purpose of relieving conflicts of interest in the executive branch, it would be "plainly incongruous to ask the Executive to appoint a prosecutor charged with the duty of investigating the appointing authority." [70] Thus, for independent counsel, more certainly

[69] Contrary to the court of appeals' suggestion, this Court did not merely note Congress's power to regulate elections somehow in passing. J.S. App. 36a n.27, but based its decision upholding the Acts on a detailed consideration of Art. I, sec. 4. 100 U.S. at 383-88. Further, the legislative history of the Acts is replete with evidence that Congress acted pursuant to Art. I, sec. 4 and the 15th Amendment. *See, e.g.*, Cong. Globe, 41st Cong., 3d Sess. 1276, 1280, 1283 (1871). There is no support for the court of appeals' claim that *Siebold* concerned Congress's power to judge its members' elections under Art. I, sec. 5, cl. 1. As *Buckley* v. *Valeo*, 424 U.S. 1, 133 (1976), subsequently made clear, Art. I, sec. 5 does not even confer "a general legislative power," but a "judicial" power; therefore, "[w]hatever power Congress may have to legislate . . . must derive from § 4, rather than § 5, of Art. I."

[70] *1973 Senate Hearings*, *supra* note 2, Pt. 2, at 558 (Prof. Heymann & Breyer).

than for the election supervisors in *Siebold*. "[n]either the President, nor any head of department, could have been equally competent to the task." 100 U.S. at 398.

The lack of "incongruity" in court appointment is also far plainer, compared to election supervisors, by reason of the courts' affinity with the duties of independent counsel. Prosecutors share the dual nature of the marshal cited by the Court in *Siebold*: each "is an executive officer, when appointment, in ordinary cases, is left to the President and Senate," but each also "is pre-eminently the officer of the courts." *Id.* at 397. Unlike election supervisors, whose duties had "nothing to do with the judicial process," "the functions [an independent counsel] is charged to perform are so closely connected with the judicial functions" [71] that "[t]he courts are entirely familiar with the qualities that make a good prosecutor." [72] Under *Siebold* the courts are uniquely well-situated to appoint independent counsel for reasons of both their knowledge of counsels' functions and the relative disability of alternative modes of appointment.

The Congress has used its Appointments Clause power to vest in the courts authority to appoint officers other than pure judicial officers very sparingly. This infrequency reflects Congress's agreement as a matter of policy that "[i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government . . . to which the duties of such officers appertain." *Siebold*, 100 U.S. at 397. Occasionally, however, exceptional circumstances occur, as they did during Reconstruction and they have in the Ethics Act, warranting judicial appointment. In such circumstances, unless Congress has designated an "incongruous" means of appointment, the Constitution commands respect for Congress's determination.

[71] *1973 Senate Hearings*, *supra* note 2, Pt. 1, at 321, 322 (Prof. Philip Kurland).

[72] *Id.*, Pt. 2, at 557 (Prof. Breyer & Heymann).

Finally, *Siebold*'s "incongruity" standard is consistent with the Court's guidance that "in determining whether [a statute] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *GSA*, 433 U.S. at 443. On the appointment side as with removal, Congress has carefully sought to minimize intrusion into the executive branch. First, the statute narrowly focuses the reach of court appointment solely on cases of executive conflicts of interest. Broader-based attempts to authorize judicial appointment of executive officers — whether of the nation's principal law enforcement officials, such as the Attorney General, or of officers with responsibilities in areas such as agricultural policy, foreign affairs, or war, *see* J.S. App. 39a — could threaten, in contrast to the Ethics Act, to "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." 433 U.S. at 443.

Second, the Act gives the executive, through the Attorney General, sole authority to determine according to law when allegations of criminal misconduct are serious enough to create the need to trigger the judicial appointment power. In the absence of enabling action by the Attorney General, the court is powerless to make an appointment. 28 U.S.C. 592(b)(1), 593(b). Thus, Congress has delegated to the courts only the single act of selecting an impartial, capable attorney to supervise an independent investigation. Vesting solely that power of selection in the courts in order to guarantee impartiality and ensure public confidence in no way "prevents the Executive Branch from accomplishing its constitutionally assigned functions." 433 U.S. at 443.

CONCLUSION

The constitutionality of the independent counsel law should be sustained.

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MARCH 1988.

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No. 87-1279

Supreme Court, U.S.
FILED
JOSEPH F. SPANIOL
CLERK

IN THE
Supreme Court of The United States
October Term, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS, and CAROL E. DINKINS,
Appellees.

On Appeal From the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF WHITNEY NORTH SEYMOUR, JR., INDEPENDENT COUNSEL (IN U.S. V. DEAVER) IN SUPPORT OF APPELLANT ALEXIA MORRISON, INDEPENDENT COUNSEL

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IN THE

Supreme Court of the United States

October Term, 1987

No. 87-1279

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

THEODORE B. OLSON, EDWARD C. SCHMULTS and CAROL E. DINKINS,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF WHITNEY NORTH SEYMOUR, JR., AS AMICUS CURIAE IN SUPPORT OF APPELLANT ALEXIA MORRISON, INDEPENDENT COUNSEL

INTEREST OF AMICUS CURIAE [1]

This brief is submitted to provide the Court with additional information and insights on the workings of the Independent Counsel statute based on the experience of an Independent Counsel who has actually completed an investigation and prosecution under the statute. The interest of Independent Counsel Whitney North Seymour, Jr., in this case arises from the fact that he was appointed Independent Counsel on May 29, 1986,

[1] All parties have consented to the filing of this brief *amicus curiae* in support of appellant Alexia Morrison, Independent Counsel. Copies of these written consents have been filed with the Clerk.

pursuant to 28 U.S.C. §592(c)(1), for purposes of investigating, and, if warranted, prosecuting Michael K. Deaver, former White House Deputy Chief of Staff and Assistant to the President of the United States. This appointment was made in response to widespread public concern over whether Mr. Deaver's conduct, following his departure from the White House to found a Washington, D.C. lobbying firm, violated the Ethics in Government Act, 18 U.S.C. §207.

This concern led five members of the United States Senate to write to the Attorney General, on April 23, 1986, requesting the appointment of an independent counsel. 28 U.S.C. §595(e). Two days later, on April 25, 1986, the Office of Government Ethics wrote the Attorney General advising him that its own investigation suggested that Deaver had violated the law. On May 10, 1986, the Government Accounting Office expressed its belief that Deaver's activities might have been unlawful. On April 28, 1986, through his counsel, Deaver himself requested the Attorney General to appoint independent counsel.

On May 22, 1986, pursuant to 28 U.S.C. §592(c)(1), Deputy Attorney General D. Lowell Jensen moved a Division of the United States Court of Appeals for the District of Columbia Circuit for the appointment of an independent counsel in the Deaver matter. The application was submitted by the Deputy Attorney General because the Attorney General had recused himself from the matter. *See* 28 U.S.C. §591(c). The application set forth the recommended subject matter of Independent Counsel's jurisdiction, and on May 29, 1986, the Special Division appointed Whitney North Seymour, Jr., as Independent Counsel in an order conferring upon him jurisdiction tracking the Deputy Attorney General's request.[2]

[2]In March 1987, after grand jury testimony had been completed, and virtually on the eve of indictment, Independent Counsel was offered a "parallel appointment" as a Justice Department employee. *See* 52 Fed. Reg. 7270 (1987). The offer was not accepted.

Following an unsuccessful pre-indictment challenge by Deaver to the constitutionality of the independent counsel statute,[3] the grand jury returned an indictment on March 18, 1987, in five counts, which charged Deaver with perjury, in violation of 18 U.S.C. §§1621, 1623.[4]

Trial of this indictment commenced before the Honorable Thomas Penfield Jackson, United States District Judge, and a jury on October 19, 1987. On December 16, 1987, the jury returned a verdict of guilt on three counts of the indictment, and acquitted Deaver on two counts.

While awaiting sentencing, which was scheduled for February 25, 1988, a panel of the United States Court of Appeals for the District of Columbia Circuit held the independent counsel provisions of the Ethics in Government act unconstitutional. *In Re: Sealed Case*, Misc. Nos. 87-5261, 87-5264 and 87-5265 (D.C. Cir. January 22, 1988).

On the authority of that decision, on January 22, 1988, Deaver moved in the District Court to vacate the verdicts of guilt and for dismissal of his conviction. Independent Counsel opposed the motion, and on February 2, 1988, *sua sponte*, Judge Jackson stayed all proceedings in the case pending review of the *In Re: Sealed Case* decision.

[3]*Deaver v. Seymour*, 656 F. Supp. 900 (D.D.C 1987), *aff'd*, 822 F.2d 66 (D.C. Cir. 1987), *stay denied*, 55 U.S.L.W. §641 (U.S. March 18, 1987).

[4]Three counts of the indictment alleged that Deaver perjured himself during his voluntary appearance before the grand jury. Two counts alleged that Deaver committed perjury when he testified on May 16, 1986, before the Subcommittee on Oversight and Investigations of the House Committee on Commerce and Energy. On August 12, 1986, pursuant to a unanimous determination of the Subcommittee, its chairman, Rep. John D. Dingell, referred to Independent Counsel the question whether Deaver had committed perjury before the subcommittee.

Independent Counsel Seymour submits this brief in order to emphasize the urgency of the resolution of the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§49, 591-98, heightened by the current posture of the Deaver case in the District Court. A jury verdict of guilt has been returned; no sentence has been imposed; no judgment of conviction has been entered; and all proceedings are at a standstill.

Second, this brief is submitted to enhance the completeness of the defense of the challenged statute.

Third, this brief responds to the erroneous statements contained in the panel decision concerning the operation and functions of an independent counsel pursuant to the Ethics in Government Act.

SUMMARY OF ARGUMENT

The independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§49(a), 591-98, are consistent with the principle of separated powers, and a constitutional response to the problem of executive branch conflict of interest. The necessity of a mechanism for providing a genuinely independent capacity for investigation and prosecution, when a conflict of interest disables the Justice Department from performing its customary role, is reflected in the record of the investigation and trial of *United States v. Deaver*, Crim. No. 87-0096 (D.C.D.C. 1987).

Furthermore, an examination of the record of the actual operation of an independent counsel reveals that the purported constitutional defects in the statute are more imagined than real. Specifically, the statute does not usurp the Attorney General's substantial control over the decision whether to prosecute. Nor

does reliance on judicial appointment of independent counsel depart from the historic relationship between the judicial and prosecutive functions. Finally, the independent counsel does not threaten individual liberty.

ARGUMENT

POINT ONE

AS EVENTS SURROUNDING THE INVESTIGATION AND PROSECUTION IN UNITED STATES V. DEAVER DEMONSTRATE, THE INDEPENDENT COUNSEL STATUTE IS A RESTRAINED AND CONSTITUTIONALLY CORRECT RESPONSE TO THE PROBLEM OF CONFLICT OF INTEREST IN THE EXECUTIVE BRANCH

The independent counsel provisions arose from a legislative determination, following "Watergate," that there was a critical "need for a special prosecutor to handle cases *where the Attorney General has a conflict of interest.*" H.R. Rep. No. 1307, 95th Cong., 2d Sess. (1978) (emphasis supplied).

The conflict of interest issue is not merely theoretical. In the Deaver matter, the application for appointment of Independent Counsel was submitted to the Special Division by the Deputy Attorney General expressly because the Attorney General, a longtime colleague and friend of the defendant, had recused himself. When Deaver's indictment was announced, the President of the United States publicly stated he and Mrs. Reagan "wish[ed] [Deaver] well." (*Time*, 3/30/87, p. 23) When the jury returned its verdicts, the President released a statement that he was "sorry to learn of the jury's decision." (*Washington Post*, 12/17/87, p. 1 col. 1) Both statements could have aroused public concern over the commitment of the executive branch to the enforcement of the criminal law in this

case, were it not for the fact that investigation and prosecution were entrusted to an Independent Counsel.[5]

The "need for a Special Prosecutor to handle cases where the Attorney General has a conflict of interest," as found by Congress in its passage of the Ethics in Government Act, arises not because of the proposition that "Presidents can no longer be trusted to ensure that their senior appointees obey the criminal laws," (Slip Op. at 60) as the Court of Appeals majority opinion characterized the issue, but rather because of the perceived need for public confidence in the administration of the laws, and the need to avoid actual and apparent conflicts of interest.[6] This is especially important in the enforcement

[5]It is not hard to imagine the genuine concerns of career Department of Justice employees assigned to investigate Deaver's conduct in the face of such expressions of personal friendship for the target of the investigation. Compare President Grant's efforts to block the investigation and prosecution of his personal aide and friend in the Whiskey Ring scandal a century before. (See Appendix at 7a-9a.)

[6]This is exactly the reason why the President and Attorney General of a prior Administration strongly supported the independent counsel bill and (in direct contrast to the present Administration) espoused its constitutionality. Said the representative of the Department of Justice to the Ribicoff Committee in 1977 (Asst. A.G. John Harmon, Office of Legal Counsel):

> In view of the departure which this bill takes with respect to the normal methods of appointing and removing Executive officials, I shall briefly state our views as to the constitutionality of the measures here. We believe that judicial appointment is justified by the Appointments Clause, Article II, section 2, and the extraordinary circumstances which would mandate a recourse to a special prosecutor. It is our view that ordinarily Article II, section 2 cannot be used to override the fundamental principle of the separation of powers; this principle would generally require that the Executive be allowed to appoint those officials carrying out Executive functions. ***However, the circumstances surrounding misconduct by high-level officials and the need to preserve the appearance of justice would warrant a judicial appointment here.*** In such exceptional circumstances

of laws governing persons holding high public office, particularly when those officeholders, or former officeholders, are close personal friends or colleagues of those in power.

The "core function" of the Independent Counsel in the Deaver case was to investigate the interaction between Deaver and his former executive branch colleagues, both when Deaver served in the White House and after, when he remained a close personal friend and confidant of the President and Mrs. Reagan. By its very assignment, the focus of the investigation was on the nature and substance of communications between Deaver and executive branch officials, and information about many of those communications could be obtained only by questioning — sometimes less than friendly questioning — of sitting officials.

Witnesses and potential witnesses in the Deaver case included Attorney General Meese, Secretary of State Shultz, former Chief of Staff Regan, United States Trade Representative Yeutter, Secretary of Treasury Baker, former Secretary of Transportation Dole, former White House Counsel Fielding, present and former Ambassadors, former National Security Council advisors, and the President himself, as well as countless Deputy Secretaries and personal friends.[7] Perhaps even more important, many of the witnesses who had to be questioned in order

> we do not believe that an "incongruous" duty would be imposed upon the courts. *See* Ex parte Siebold, 100 U.S. 371, 398 (1879).
>
> The extraordinary circumstances inherent in the need for resort to a special prosecutor would also justify the restrictions placed on the Executive's power of removal in this instance.

Hearings before the Committee on Governmental Affairs, U.S. Senate, 95th Cong., 1st Sess. on S.555 (May 3, 1977) (at p.16) (emphasis supplied.)

[7]Over twenty present or former executive branch officials and employees were called as trial witnesses.

to carry out the investigation also included a number of lower-level executive branch employees, including secretaries, photographers, and security guards, some of them with eyewitness testimony relating to their current superiors or colleagues. To the extent that any of these witnesses were willing to give information harmful to the President's friend, who can say that they would have been as willing if the investigator seeking the information had been another executive branch insider?

Issues investigated in the Deaver case involved Presidential decisions on appointment of and contacts with a special envoy in connection with the Canadian-U.S. "acid rain" issue, White House involvement in retention of an important tax code provision for companies investing in the Caribbean, insertion of remarks into Presidential and Vice Presidential statements, Presidential involvement in key foreign trade issues, efforts to influence the executive branch on economic protectionism and foreign policy, and Presidential involvement in decisions over space station funding and selection of a supplier for a new Air Force One, the President's plane.

A main theme of the defense was that the defendant had never traded on his special relationship with the President. Independent Counsel's case depended in great part on the ability to prove otherwise, by showing Deaver-Reagan contacts through a variety of means and leads, not all of them calculated to be popular at the White House. Even if these matters could have been investigated effectively by the Administration in power, could such an investigation ever have quelled the doubts over whether personal or political influence had been brought to bear on the investigation?

The necessity of genuinely independent counsel to investigate and prosecute when conflicts of interest arise is also demonstrated by an examination of the conduct of the Deaver trial.

Four incidents that occurred during pretrial and trial proceedings in the Deaver case illustrate the necessity of an office of independent counsel, and the appropriateness of the independence guaranteed by the Ethics in Government Act, to provide assurance to the public that the laws of the land are being faithfully executed. Only one of these episodes is even referred to in the majority opinion, which is based on a very narrow factual record arising out of a contempt proceeding in connection with a grand jury subpoena.

A. The Subpoena to the Canadian Ambassador

That incident, the first to be discussed here, is even referred to inaccurately in the opinion by the panel majority below. The majority opinion cited our office's "attempt to subpoena the Canadian Ambassador in the face of strenuous opposition by the Department of State on this delicate diplomatic question" (Slip Op. at 57) as troubling evidence of the danger of lack of executive branch supervisory authority over the Independent Counsel. In fact, the record shows that our office had initially contacted the Canadians through diplomatic channels, had obtained information by Canadian government cooperation that had contributed to a portion of the indictment against Deaver, and had been communicating for months without opposition from the State Department on a lawyer-to-lawyer basis as directed by the Canadian government.

The "attempt to subpoena" referred to by the majority consisted of an effort to determine if the Ambassador would voluntarily accept a subpoena. When the position of the Canadian government changed from cooperation to resistance, there remained the issue of whether the prior cooperation constituted a waiver of diplomatic immunity, which we put to the court to decide. The State Department opposed the Independent Counsel's argument to the Court that a waiver had occurred

and the Court ruled in favor of the State Department's position. Plainly, the issue of waiver was for the *court*, not the *executive* to decide. *National Bank v. Republic of China*, 348 U.S. 356, 358 (1955). We submit this incident reflects a proper working of the system of checks and balances — not an aberration.

B. Relations With Executive Agencies Over Classified Documents

During the Independent Counsel's preparation for trial, the Office obtained and reviewed classified documents from a variety of sources within the Administration, including the National Security Council, State Department and intelligence agencies. The Office also represented the interests of the White House and other agencies in negotiations over Deaver's document declassification requests and the Classified Information Procedures Act, where those agencies' interests were consistent with those of the Office of Independent Counsel. Where they were not, the agency or the Department of Justice furnished its own counsel.

These executive agencies sometimes had strong institutional interests not to declassify certain documents. The Office of Independent Counsel sometimes had a strong institutional interest to have these documents declassified — both to use them affirmatively and also to block "graymail," the defense claim that declassification was required in order to obtain a fair trial. Arms-length negotiations were held with each of the respective agencies.

The final result of this process was effective cooperation, no leaks and no complaints. In fact, the Office of Independent Counsel declined to challenge one agency's refusal to declassify two key documents that related directly to an important issue

in the case. Suppose that decision had been made by counsel that did not have independence? What would the public perception be of whether a responsible decision had been made?

C. The Trial Examination of Government Officials

The third incident involved the redirect examination at trial of the Secretary of State, a self-described friend of Deaver, who had been called as a prosecution witness to testify to his contacts with the defendant. On cross-examination, Deaver's lawyer elicited what amounted to opinion testimony of the defendant's character. Because of the independence afforded by the Act, Independent Counsel was able to function properly as a trial lawyer uninhibited by political restraints, and to cross-examine Secretary Schultz freely and vigorously on a range of subjects without fear of effective retribution within the Administration.[8] (Tr. 2198-2201)

A look at the results illustrates the wisdom of the Act. Suppose the prosecutor had made a perfectly appropriate tactical decision not to cross-examine Shultz. Would the public have been confident that the decision had been made for sound tactical reasons and not as an improper exercise of power? On the other hand, without that cross-examination, would the jury have been able to disregard Shultz's character testimony, as it did?

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[8]Counsel was able to do this despite a political atmosphere reflected in remarks to the press by "White House spokesman," Marlin Fitzwater, presumably on behalf of the executive branch. Fitzwater was quoted as telling the press: "I find it outrageous that he [Seymour] would find it wrong for one friend to feel sorry for the hardships of another and he is totally out of line." (*Washington Post*, December 19, 1987, p. A3, col. 3)

D. The Question of Presidential Testimony

The fourth incident is referred to in a bench conference during trial (Tr. 2881-2; 2978-81). One hotly disputed issue at trial was whether Deaver, while he was a private citizen, had obtained a personal letter of introduction from President Reagan to President Chun of Korea, in part to ensure that Deaver could get in to see President Chun on behalf of a private client, and on behalf of his own client development efforts.[9] The American Ambassador to Korea testified that he had been with Deaver when he presented such a letter to President Chun, but defense counsel suggested the Ambassador was sick and confused. (Tr. 2754, 2796-2800)

The issue of whether Deaver had obtained a letter from President Reagan in furtherance of these private efforts led defense counsel to ask the Court for production of the Independent Counsel's notes of his interview with President Reagan as *Brady* material.[10] In response to the request, the trial judge reviewed the Independent Counsel's notes *in camera*, and found that the notes, which it kept under seal, indeed related to the letter described by Ambassador Walker. The Court denied the request for disclosure, however, advising Deaver's counsel, the notes were "not exculpatory of your client." (Tr. 2979) When Deaver's counsel inquired whether the notes showed if the President had indicated such a letter existed,

[9]At the time, Deaver was simultaneously soliciting the Korean government as a client so he could lobby the American government on its behalf, as well as lobbying the Korean government on tobacco issues on behalf of an American client, Philip Morris. (Tr. 814-851)

[10]The White House denied that it had a copy of the letter, and the Korean government blocked inquiry by invoking diplomatic immunity. (Tr. 2797) It should be noted that State Department channels were used to explore the Korean government's position, and unlike the Canadian matter, no public dispute between State and Independent Counsel occurred, nor did any issue arise which required a ruling by the Court.

the Court stated, "The answer is unfavorable to you." (Tr. 2980).

Two points are illustrated by this incident. First, as should be apparent even to critics of the institution of the Office of Independent Counsel, at least some restraint must have been employed in the Independent Counsel's choice of trial witnesses, even by an officer who was not in fear of instant removal by the President or Attorney General. Second, suppose a non-independent counsel subject to instant removal had made a decision not to call the President as a witness. Would the public be assured that justice had been fairly administered?

We submit that this and the other incidents above are classic examples of a trial lawyer on the firing line enjoying the requisite freedom to exercise his best judgment on behalf of his client. Here counsel was allowed to make independent decisions on important questions of trial strategy without jeopardizing public confidence in the effectiveness of the administration of justice.

Finally, in addition to the need for independence in deciding what steps to take in the day-to-day decisions involved in investigating and presenting a case to the Court, there is a need for independence in deciding what steps *not* to take. Only if those decisions not to do certain things are made by an office untouched by questions of conflict of interest will the public trust be won. Contrary to the analysis in the panel majority's opinion, the success of the Office of Independent Counsel does not turn on whether it returns indictments or achieves convictions (Slip Op. 70-71), but on whether or not the office is perceived to be doing its job properly, whatever the facts happen to be.

POINT TWO

AS THE ACTUAL EXPERIENCE IN UNITED STATES V. DEAVER PLAINLY SHOWS, THE STATUTE IS NEITHER AN UNCONSTITUTIONAL INVASION OF THE EXECUTIVE POWER OVER PROSECUTORIAL DECISION-MAKING NOR A THREAT TO INDIVIDUAL LIBERTY.

The panel majority held that the independent counsel statute "as a whole . . . so deeply invades the President's executive prerogatives and responsibilities and so jeopardizes individual liberty as to be unconstitutional." (Slip Op. 74). This erroneous conclusion is based on a misunderstanding of the relationship between the judicial and prosecutive functions, as well as on mistaken speculation about the actual functioning of an independent counsel.

A. The Attorney General Retains Substantial Control Over The Decision To Prosecute.

Under the Independent Counsel statute, it is the Attorney General who makes the *policy* decision whether a prosecution should take place (if supported by the facts) at the time he decides to file his application with the Special Division (28 U.S.C. §592(b)(1)).[11] If he decides for policy reasons that he

[11]By "policy decision," we refer to the "legitimate exercise of discretion and the [Justice] Department's established policies of law enforcement," which the statute contemplates will influence this decision. S. Rep. No. 496, 97th Cong., 2d Sess. 14 (1982), p. 17.

In the Deaver matter, the application by the Deputy Attorney General expressly directed the Independent Counsel to prosecute any federal law violations supported by the evidence.

> It is recommended that the independent counsel's jurisdiction include ***investigative and prosecutive authority*** over the specific allegations described in Part II above. In addition, it is recommended that the independent counsel's jurisdiction include ***investigative and prosecutive authority*** over all other allegations presented in the three referrals, and over any related matters developed in the course of the independent counsel's investigation.

(Appl. p.6-7) (emphasis supplied).

will not authorize such a prosecution, his option is not to file any application with the Special Division and then explain his reasons to the community. Under the statute, that decision is unreviewable. *Id. See also Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (en banc); *Nathan v. Smith*, 737 F.2d 1069, 1077-82 (D.C. Cir. 1984) (Bork, J., concurring). In that respect, his policy-making function is no different than it would be if he delegated only investigative responsibility to independent counsel, and reserved decision on whether to authorize prosecution until the investigation had been completed.[12]

The Independent Counsel's function as far as prosecution is concerned could be described as essentially a ministerial one: to review the legally admissible evidence to determine if it will support a conviction beyond a reasonable doubt, and, if so, to proceed, if prosecution is consistent with the relevant Justice Department guidelines. The statute expressly directs the Independent Counsel to follow the Department of Justice guidelines in performing this and other functions. 28 U.S.C. §594(b). He is not permitted to operate capriciously or arbitrarily on his own. (Contrast Slip Op. at p. 72.)[13]

[12]When the Department of Justice refers cases to individual United States Attorneys for investigation and prosecution, the policy question of whether to prosecute if the facts warrant is made at that point. The U.S. Attorney ordinarily does not report back for further instructions after completion of the investigation.

[13]The United States Department of Justice's "Principles of Federal Prosecution" are printed in booklet form and available to the public. In the Deaver matter, copies were made available to every member of the legal staff in the early stages of the investigation.

The majority opinion erroneously asserts that under the statute the Attorney General has no effective power "to define, circumscribe, or supervise" the duties of the Independent Counsel. (Slip Op. 19.) For all practical purposes, the statutory directive to follow Departmental policies gives the Attorney General exactly the same power over the execution of the duties of the Independent Counsel that he has over every other prosecutor in the Department. The Attorney General sets the ground rules, and the prosecutors carry them out.[14] When the Attorney General asks the Special Division to appoint Independent Counsel to *prosecute*, he delegates sufficient discretion (within the Department's guidelines) to permit the Independent Counsel to carry out his assigned duties. He does not yield up the policy decision on *whether to prosecute* if sufficient evidence is developed — that decision is made when the Attorney General decides to file the application for appointment of Independent Counsel, because at that point he has made the statutory determination that "further investigation or prosecution is warranted." 28 U.S.C. §592(c).[15] Plainly,

[14]Decisions as to whether to recommend two counts or ten in an indictment; when and whether to call witnesses; whether to object to particular questions by defense counsel are only "ministerial and mechanical" functions insofar as they affect the operations of the Department of Justice. (See Slip Op. at p.50.)

[15]This is no theoretical matter. At the time of the original hearings on the legislation, the Department of Justice summarized its experience in evaluating allegations against public officials and concluded that some 75-80% of such allegations would not warrant the appointment of a special prosecutor:

> By our best estimate, about 37 allegations received against individuals during the past year would come under the jurisdiction of the Special Prosecutor as that jurisdiction is established in S.555. Of these 37 allegations, 16 were so patently lacking in support that they were disposed of without preliminary investigation. Another 12 allegations were disposed of after preliminary investigatory work taking less than 60 days to complete. The remaining 9 allegations required more than 60 days to investigate. Of the 37 allegations, we think that the 28 that were disposed of within 60 days would not have warranted the appointment of a special prosecutor.

Hearings before the Committee on Governmental Affairs, United States Senate, 95th Cong., 1st Sess. on S.555 (May 3, 1977) (at p. 9).

the policy-making phase is long past at the point the indictment is filed by the appointee carrying out the Attorney General's original decision. What remains is merely the faithful discharge of an assigned duty.

While it is true that once appointed, independent counsel operates without day-to-day supervision of the Attorney General, the panel majority misunderstands our legal history when it asserts that the principle of separated powers cannot tolerate a federal prosecutor's limited independence from the Attorney General.[16] The Judiciary Act of 1789, Ch. 20, 1 Stat. 73, provided for the appointment of both the Attorney General and an attorney in each federal district "to prosecute . . . all delinquents for federal crimes and offenses." The Attorney General, however, *"had no formal control* over the conduct of the local federal law enforcement officers." *3 Encyclopedia*

[16]For a discussion of relevant historical sources, *see* the Appendix to this brief. Of course, the "critical factor" limiting independent counsel's independence is, as this Court acknowledged in *Bowsher v. Synar*, 106 S. Ct. at 3188, the power to remove, which remains with the Attorney General. Inexplicably, the panel majority concluded that "in practical terms," the independent counsel's superior is the Special Division. This is simply a false and unsupported assertion. The "practical terms" of the functioning of this amicus as Independent Counsel has involved *no judicial supervision or interference whatsoever.*

The reference at footnotes 59 and 60 of the majority's opinion to the Special Division clarifying orders concerning staff appointments is incomplete and misleading. What was involved was a cloud cast upon the ability of Independent Counsel to select qualified associate counsel — a matter involving the Special Division's appointive authority, and having nothing to do with "the day-to-day activities" of Independent Counsel in the conduct of substantive investigative or prosecutive responsibilities.

of Crime and Justice 1291 (S. Kadish, ed. 1983) (emphasis supplied). Although proposals to give the Attorney General authority over "federal district attorneys," as they were then known, were introduced in Congress as early as 1791, legislation to achieve this objective was not enacted for another seventy years or more. Hence, "it was not until after Reconstruction and the creation of the Department of Justice in 1870 that the various prosecutors came under any meaningful national supervision." *Id. See generally* Cummings & McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* (1937); Huston, *The Department of Justice* (1967); Schwartz, "Federal Criminal Jurisdiction and Prosecutor's Discretion," 13 *Law & Contemporary Problems* 64-87 (1948).[17]

[17]Although the Constitution makes no specific reference to the nature or organization of prosecutorial powers, more general writings on the executive and the doctrine of the separation of powers cast some light on the Framers' intent. While Madison in *Fed.* 48 noted the tendency of the legislature to absorb the other departments, the Federalists did not ignore the threat from the executive. Hamilton in *Fed.* 69 meticulously contrasts the proposed executive with the King of Great Britain in an attempt to assure his audience that history will not repeat itself. While overall, the Federalists appeared more fearful of legislative usurpation, this may simply have reflected their belief that Article II had incorporated sufficient limitations and safeguards against executive encroachment. Madison in *Fed.*48 describes "the executive power being restrained within a narrower compass, and being more simple in its nature." *Fed.* 48 at 334. Moreover, while Hamilton in *Fed.* 70 stresses the need for unity in the executive, his justification for this is to ensure responsibility and accountability — the objective behind the office of independent counsel.

The Federalist Papers nevertheless help a proper understanding of the doctine of the separation of powers. Drawing on Montesquieu, Madison in *Fed.* 48 explained that the doctrine, "does not require that the legislature, executive, and judiciary departments should be wholly unconnected with each other." In fact, he contended, "that unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." Equally important as the Federalists' explanation of the mechanics of the separation of powers is their revelation of the objective of this doctrine. Reflecting the theory of mixed government still prevalent in many state governments at that time, the Federalists were less concerned with maintaining the functional purity of the branches than they were with preventing the ascendancy of a single branch, with its resulting tyranny.

Viewed against this historical backdrop, the Attorney General actually exercises *greater* control over independent counsel, by virtue of his power over appointment, removal and the definition of jurisdiction, than attorneys general exercised over federal prosecutors for the first half of our republic's history. It is therefore difficult to accept the panel majority's view that the principle of separated powers cannot tolerate independent counsel's limited freedom from direct control by the Attorney General, when the Framers tolerated a far greater degree of such independence.[18]

B. Judicial Appointment Of Prosecutors Is Compatible With The Separation of Powers

The majority opinion's conclusion that judicial appointment of independent counsel is incompatible with the structure of our government ignores the substantial evidence to the contrary from numerous state jurisdictions.

[18]An examination of the present-day relationship actually prevailing between the Attorney General and the United States Attorneys throughout the country similarly reveals considerable independence. "Whether because of history, the selection process, or sheer volume of business, the *United States Attorney's daily operations remain largely free of control* by officials in Washington, D.C.... Although the department may announce broad priorities for federal law enforcement, each *United States Attorney ultimately makes his own decisions* about which cases to pursue and the resources to be allocated to particular enforcement efforts." *3 Encyclopedia of Crime and Justice, supra,* at 1292 (emphasis supplied). *See also Principles of Federal Prosecution,* at 8 (Department of Justice 1980) ("Individual United States Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance.")

As the Appendix to this brief sets out in greater detail, state courts have traditionally been authorized by statute to appoint special prosecutors in many states, and the courts in other state jurisdictions have long insisted, even in the absence of statutory authority, that they have inherent power to appoint *pro tem* prosecutors. (See Appendix at 14a-15a, *citing* testimony at Hearings on S. 2803 and S. 2978 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 93d Cong., 2d Sess. 351, 352, 362 (1974).

When this judicial power has been challenged, it has routinely been upheld. In the State of Connecticut, for instance, "the system of judicial appointment of the state's attorney has functioned effectively for nearly 270 years. . . ". *State v. Moynahan*, 164 Conn. 560, 325 A.2d 199 (1973) ("the practice has prevailed [since 1704] to the present time without interruption and, until recently without disputation"). In language which marks a sharp break from the panel majority's view that judicial and prosecutive functions cannot constitutionally intersect, the Connecticut Supreme Court has written,

> *The functions of a state's attorney are not purely those of an executive officer.* As a representative of the people of the state, he is under a duty not solely to obtain convictions but, more importantly, (1) to determine that there is reasonable ground to proceed with a criminal charge; State v. Hayes, 127 Conn. 543, 581, 18 A.2d 895; (2) to see that impartial justice is done the guilty as well as the innocent; and (3) to ensure that all evidence tending to aid in the ascertaining of the truth be laid before the court, whether it be consistent with the contention of the prosecution that the accused is guilty. State v. Harris, 147 Conn. 589, 598, 164 A.2d 399; State v. Zimnaruk, 128 Conn. 124, 127, 20 A.2d 613.

> The state's attorney, thus, is an officer charged with important duties and responsibilities in the administration of justice. *Such duties* of a state's attorney *are entirely consistent with judicial power* as prescribed by our constitution. State v. Hayes, supra.

Id. at 206 (emphasis supplied).

Moreover, it is not uncommon for state court judges to exercise prosecutive powers through one-man grand juries, which typically involve state court judges who take on investigative responsibilities. *See, e.g.*, Wis. Stat. §968.26; Mich. Comp. L. §767.3. In *In re Oliver*, 333 U.S. 257, 261, n. 4 (1948), this Court acknowledged the fact that similar statutes existed, and were in use, in at least ten states, and that under such a scheme, the "judge-grand jury is authorized to appoint its own prosecutors, detectives and aides at public expense . . ." *Id.* at 263, *citing In re Investigation of Recount*, 270 Mich. 328, 331, 258 N.W. 776, 777 (1935). There is not a hint in the Court's opinion in *In re Oliver* that the judicial exercise of investigative functions, and of the power to appoint prosecutors, offends the principle of separated powers.[19]

These statutes have been been repeatedly found by the state courts to be consistent with traditional understandings of the separation of powers, and the need to avoid the assignment of non-judicial power to the courts. *See, e.g., In re Slattery*, 310 Mich. 458, 17 N.W.2d 251 (1945); *State v. Washington*, 83 Wis.2d 808, 266 N.W.2d 597 (1978).

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[19] *In re Oliver* involved a witness who had been convicted of contempt for false and evasive testimony before a one-man grand jury. The Court reversed the conviction on the ground that the summary nature of the adjudication of contempt lacked adequate procedural safeguards.

Accordingly, the panel majority actually seeks to dismantle, rather than uphold, the historical understanding of the proper relationship between the judicial and prosecutive function when it insists on a rigid compartmentalization of these responsibilities. Since judicial appointment of special prosecutors, and judicial exercise of investigative power, has been common in this country, both before and after adoption of the Constitution, the contention that any such arrangement is incompatible with the very structure of our governmental system finds no support in the historical record.

C. The Independent Counsel's Limited Independence Does Not Jeopardize Individual Liberty

According to the panel majority, the independent counsel's "independence from presidential and Justice Department supervision and guidance" unconstitutionally jeopardizes individual liberty. (Slip Op. 70, 74). The threat to liberty, according to the panel majority, stems from two sources: (1) independent counsel's purportedly "unique incentives to seek an indictment," rather than decline prosecution, and (2) independent counsel's purported isolation from the "accumulated lore and wisdom" of career Justice Department prosecutors, which, it is argued, ordinarily operate as restraints on the decision to prosecute. (Slip Op. 70-72). Neither of these purported sources of unfairness are more than an imagined threat to liberty, much less a source of constitutional infirmity.

The record of past independent counsels simply refutes the panel majority's fear that independent counsel is preconditioned to prosecute. Until the Deaver investigation, every prior independent counsel terminated his investigation with a declination of prosecution, on grounds of evidentiary weakness or

otherwise.[20] Contrary to the panel majority's speculation that the nature of prosecutorial decision-making in a high-visibility, single case context intolerably encourages prosecution, the opposite of this conclusion is much more likely to be the case. A prosecutor who "administer[s] the criminal law across a wide population" is in a much better position to go forward in a marginal case, or one involving evidentiary or other weaknesses, precisely because "the success of the office" will not be measured by that one case. (Slip Op. 70-71). Independent counsel, on the other hand, is a prosecutor whose mission is often "to investigate and perhaps prosecute a single individual." *Id.* Since the effectiveness of the counsel's "office itself, in the public's eyes, at least, must turn to some extent upon whether indictment and conviction are obtained," *id.*, there is actually a disincentive to going forward in all but the clearest, most certain cases. In other words, the high-visibility, single case context instills caution, even reluctance, rather than the undue eagerness suggested by the panel majority.

Secondly, the panel majority's assumption that independent counsel is isolated from the reservoir of practical experience and long-range institutional perspective of the Justice Department is simply false. The majority opinion asserts that in performing his prosecutive functions, and particularly in exercising prosecutorial discretion, an independent counsel does not have "access to officials who are participants in the ongoing process of enforcing the law. . ." (Slip Op. 72). However, this statement wholly disregards the express authorization in

[20]Four distinguished attorneys (Arthur H. Christy, Gerald J. Gallinghouse, Leon Silverman, and Jacob A. Stein) served as Independent Counsel prior to the appointment in the instant case of James C. McKay, and, upon his withdrawal due to potential conflict, Alexia Morrison. Each of the prior investigations resulted in a decision not to go forward with a criminal prosecution.

the statute to request such assistance both from the United States Attorney and the Department of Justice.[21] It also disregards the fact that most Independent Counsel and their staffs have had extensive prosecutive experience in the Department of Justice, and that in actual practice Independent Counsel regularly do confer with staff members in the Department (as was done extensively in the *Deaver* case) and vice versa.

Finally, it is difficult to perceive the unconstitutional unfairness that inures to persons "who find themselves the target of independent counsel's attention," (Slip Op. 70) [22] since such persons are protected by all of the constitutional and statutory limits on the power to investigate and prosecute that apply in any criminal case.

In sum, the panel majority's conclusion that the functioning

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[21]The relevant language appears in 28 U.S.C. § 594:

> Such investigative and prosecutorial functions and powers shall include — ...
>
> (10) ***consulting with*** the United States Attorney for the district in which the violation was alleged to have occurred.
>
> • • •
>
> (d) A[n] independent counsel ***may request assistance*** from the Department of Justice, and the Department of Justice ***shall provide that assistance***, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

(emphasis supplied.)

[22]We cannot help but note in passing that this does not apply to Deaver, who urged the appointment of independent counsel and voluntarily testified before the grand jury, where he perjured himself, as a trial jury has found beyond reasonable doubt.

of an independent counsel unconstitutionally threatens individual liberty is unpersuasive.[23]

CONCLUSION

For all of the foregoing reasons, appellant's appeal should be granted and the panel decision should be vacated.

Respectfully submitted,

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[23]Even if the "incentive to prosecute" or isolation from restraining institutional influences existed, which we submit they do not, these purported deficiencies in the statutory scheme might indicate its undesirability as policy; they would hardly rise to the level of a constitutional defect that would deprive Congress of its lawful power to enact the legislation.

APPENDIX

THE ROLE OF THE SPECIAL PROSECUTOR IN AMERICAN HISTORY[1]

The investigation and prosecution of alleged corruption in high places — whether that of venality or of abuse of power — has been a function to which all three branches have contributed throughout American history — often aided by the employment of independent counsel from outside the government. This appendix attempts to demonstrate the historical evidence that, under the American constitutional system, legislators, grand jurors, executive officials and special counsel have found it to be within the definition of their functions to expose bribery, graft, extortion and willful maladministration of government. Prior to that discussion, however, some consideration of the British experience might be helpful.

The British Experience

So different are British and American governance where separation of powers is concerned,[2] that one may easily argue that the British experience with the investigation and prosecu-

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[1]This appendix was prepared by Jeffrey Brandon Morris, Assistant Professor of Political Science, University of Pennsylvania, and Member of the Bar of the Supreme Court of the United States, at the request of Whitney North Seymour, Jr., Independent Counsel.

The author acknowledges the assistance of the following persons in connection with this study: Robert B. Wasserman, Rachel J. Dickstein, Jennifer D. Forstner, Jonathan R. Galst and John A. Grossman of the University of Pennsylvania; Stephanie A.J. Dangel, Tamar Benamy and Anne F. Jacobs; Professor Nancy Kassop, State University of New York at New Paltz.

[2]Compare, however, Madison's discussion of the similarities of the separation of powers notions in Federalist No. 47.

tion of crimes is not apposite. Yet, there is some perspective to be gained.

Certainly, it cannot be argued that the enforcement of the criminal law was understood to be a "core function of the executive" in England at any time from 1607 to 1787. The function of prosecution — save with State trials (extraordinary cases, touching the interests of the political authorities) — was private, and responsibility diffused. Criminal prosecutions, growing out of the law of torts, were instituted by private parties in the name of the King, unless the Attorney General refused to permit a prosecution to go on. In this manner the Crown was spared the expense of a centrally directed professional prosecutorial corps. Langbein, *The Origin of Public Prosecution at Common Law*, AM. J. LEG. HIST. 313, 335 (1973).

Prosecution was, therefore, local — drawing upon knowledge of the community — and cheap. Even today in England, there is no central corps of prosecutors for the prosecution of serious crime in the Crown Court, but rather barristers are hired on an *ad hoc* basis to prosecute for the state.

As a result of the Marian statutes of the mid-Sixteenth Century, the Justices of the Peace, leading local gentry appointed by royal commission for each county, became back-up prosecutors — interstitial prosecutors filling the gaps in a system of citizen prosecutors with the power to gather evidence and to bind witnesses for trial before royal judges on periodic circuits. *Id.* at 313-337.

There is as well something to be learned from the manner in which the British government and its senior officials are presently investigated. Tribunals of Inquiry, a mechanism invented in 1921, are employed when there are serious allegations reflecting upon the government or its ministers. Ap-

pointed by the Home Secretary after Parliamentary authorization and chaired by a leading *jurist*, the Tribunals of Inquiry are fact-finding panels which receive and may compel testimony, evaluate credibility, and transmit findings to the government. The Tribunal of Inquiry is not a court of law because it does not draw ultimate conclusions, but simply reports the facts it finds, and has no formal sanctions available to it. Yet, it has virtually an adjudicatory function because its findings may leave the government little choice as to ultimate sanctions.

The Tribunals of Inquiry may offer the only method for authoritative determination of responsibility in the British system, the only method for responsible governmental reactions, and the only method for the re-establishment of confidence in the integrity of the government. Such tribunals have been used in modern times to investigate allegations that public officials had been bribed (Justice Lynsky Tribunal of Inquiry, 1948-49), and to investigate security leaks in the defense establishment (Radcliff Tribunal). In addition, in 1963, Lord Denning, acting without statutory powers, conducted a special inquiry into allegations that the Secretary of State for War had a personal relationship with a woman who in turn was involved with Soviet agents. F. MORRISON, COURTS AND THE POLITICAL PROCESS IN ENGLAND 174-183 (1973). It has been believed from the time of the creation of the Tribunals of Inquiry that without a judge of high standing as chairman the findings would not achieve the same measure of public confidence and acceptance. Great Britain, Royal Commission on Tribunals of Inquiry, *Report of the Royal Commission on Tribunals of Inquiry* 29-30 (1966).

The American Colonial Era

It can hardly be said that the power to direct prosecutions was a "core executive function" during the colonial era or in the years immediately after independence. While in America, unlike England, there were during that period public prosecutors — a combination of the English Attorney General and the French *avocat general* and *procureur du roi* — there was still no central direction of prosecution by the executive, and even as late as 1800, most prosecution in the states was conducted by private citizens. The prosecutive mechanism was adapted to a country of independent neighborhoods with local institutions, local offenders, and problems of local order and security. R. POUND, CRIMINAL JUSTICE IN AMERICA 151 (1930). In America, the Governor was more limited in his control over the Attorney General than over other appointive officials and the Attorney General, in turn, was limited in his influence over local prosecutors.

It must also be remembered that separation of powers was not the dominant theme for the organization of governments, either in colonial times or under the new state constitutions. In general, the Governor, Council and elected deputies together formed the legislature and shared many governmental tasks. Lower houses would appoint administrative officers and sometimes hear appeals.

Even after independence, merged functions remained. In New Hampshire, for example, the legislature awarded new trials after judgment four times from 1791 to 1817. Legislative appellate jurisdiction survived until 1857 in Rhode Island. The offices of Governor and Chancellor were the same for New Jersey until 1844. F.R. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES 164-66 (1940). In the South Atlantic state constitutions, the doctrine of separation of powers was stated, but not established in practice. The legislative bodies were not only the dominant branch of government, but in many cases they also exercised administrative or executive functions. The legislatures appointed most of the officials in Virginia and the two Carolinas, including the Governor, judges, sheriffs, secretaries and the Attorney General. In Georgia, the legislature exercised the pardoning power. In Virginia, North Carolina and South Carolina, there was nothing in the Constitution which prevented the legislature from amending or revising the Constitution at will. F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860 (1966).

Justice in the New Republic

The First Judiciary Act of 1789 created a decentralized system of federal criminal law enforcement.Congress conferred the power and the duty to institute prosecutions for federal offenses upon the U.S. District Attorney for each district. But the federal district attorney was *not* made part of any organized administrative system. Their constituency was local, and throughout American history United States Attorneys have been influenced more by their local political and legal communities and their own sense of professionalism than they have been from any central administrative authority.

In an earlier draft of the Judiciary Act, the appointment of the Attorney General was vested in the judiciary. In the final draft it was vested in the executive. Between these two drafts, Livingston wrote to Ellsworth, an author of the bill, that the Attorney General should be under the executive's control. Livingston's letter did not say that placement of the Attorney General elsewhere would be unconstitutional; the choice instead was apparently based on efficiency, since it was sensi-

ble to place the Attorney General, whose primary role was legal advisor to the President, within the executive branch. Livingston's letter makes no reference to how the Act should classify U.S. Attorneys, the real prosecutors at this time.[3]

In the absence of a Home Department, such supervision as was given to the federal attorneys came from the Department of State, although contacts between the attorneys and the State Department were apparently largely fortuitous. Unlike consuls abroad, the attorneys apparently received no standard instructions, nor did they render annual or other regular reports. L.D. WHITE, THE FEDERALISTS 406-08 (1948). However, the Comptroller of the Treasury was responsible for approving suits for monies accountable to the United States. Thus, the district attorneys became subject to the comptroller's instruction in these kind of cases. Later, they also received instructions from the Postmaster General.

The Attorney General had no office, no staff, not even stationery. L.D. WHITE, THE JEFFERSONIANS 337 (1951). Although the first incumbent, Edmund Randolph, made efforts to build his office into an embryonic department of law enforcement, and to concern himself with problems of judicial administration, he largely failed to carve out a role in these areas. He received no reports and was "in a curious way disconnected from the actual conduct" of the business of government. L.D. WHITE, THE FEDERALISTS 166 (1948). The Attorney General was the legal adviser of the President and department heads, and an agent to whom the Congress might turn for information and advice. L.D. WHITE, THE FEDERALISTS 164 (1951). Until Attorney General William Wirt put a stop to it around 1819, the Congress asked the incumbent for

[3]Robert Livingston to Oliver Ellsworth (June 26, 1789) (on file at Huntington Library, San Marino, Calif.)

opinions on all manners of bills and procedures, particularly in regard to their constitutionality. L. HUSTON, THE DEPARTMENT OF JUSTICE 8 (1967). In addition, of course, the Attorney General represented the United States before the Supreme Court.

The role of the Attorney General in law enforcement did not grow rapidly. As late as 1850 his staff numbered but four, none of whom was a legal assistant. The Civil War began the process of limitation upon the independence of the U.S. Attorneys. But not until the creation of the Department of Justice in 1870 was the Attorney General given authority over the U.S. Attorneys and the law offices of other departments. It was not until 1909 that control of federal prosecution by the Department of Justice became firmly established, even as a matter of formal organizational authority. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT [Wickersham Commission], *Report on Prosecution* 8-9 (1931).

Exposure of Major Scandals in the Federal Government

The first widespread series of scandals involving political corruption in the executive branch touching the presidency occurred during the era of Ulysses S. Grant. With the single exception — the conduct of the Secretary of the Treasury Benjamin Bristow — investigations of the scandals were not the product of the executive branch. Few prosecutions resulted, and many of the malefactors continued in executive office. Congress did, however, take action against some of its own members and impeached one Cabinet secretary.

The scandals included:

1. The Credit Mobilier, organized to finance railroad construction, was awarded lucrative but fraudulent government contracts. Exposure came at first fortuitously by way of a lawsuit and leak to the press, stimulating a House investigation. Legislators and other officials had been bribed through gifts of Credit Mobilier stock. Two members of the House were expelled and the reputations of seven other members of Congress were damaged. Two Vice Presidents of the United States who had served under Grant also were disgraced.

2. Corruption in the award of Indian trading posts reached the Secretary of War, William W. Belknap. Favorites of the administration were receiving $100,000 per year. Belknap resigned to avoid impeachment. He was, however, impeached, but missed conviction in the Senate by five votes.

3. Attorney General George H. Williams, who demonstrated no degree of vigor in investigating any of the scandals, mingled his own funds with the accounts of the Department of Justice, used men on the public payroll as servants, and permitted his wife to order an expensive carriage to be paid for out of the contingent funds of the department. These revelations did not deter Grant from appointing Williams Chief Justice to succeed Salmon P. Chase, although they did prevent Senate confirmation. Not only was Williams never prosecuted, but Grant permitted him to remain Attorney General for another eighteen months.

4. Secretary of the Navy George M. Robeson was exposed by a House committee as having deposited $300,000 beyond his apparent income over seven years

by reason of his connection with a contractor for his department. Impeachment was foreclosed by the Presidential election and Robeson was never prosecuted.

5. Secretary of the Treasury William A. Richardson was revealed by a House committee to have made a contract with a political favorite to require the assistance of the regular internal revenue staff in discovering delinquent taxpayers, then substituting himself for the government officials in suit for recovery, all for the purpose of diverting one-half of the amount collected out of the Treasury. The Assistant Secretary and Department Solicitor resigned, but Grant rewarded Richardson by appointing him to the Court of Claims.

6. Due to the efforts of Richardson's successor as Secretary of the Treasury, Benjamin H. Bristow, 230 indictments were secured for evasion of internal revenue taxes on distilleries. Revenue Collectors from all over the country were involved. So widely was the net flung that Bristow dared trust no one in his department except the Solicitor, Bluford Wilson, and evidence was initially secured with the assistance of three private citizens. Among those implicated in the Whiskey Ring was General Orville E. Babcock, Grant's private secretary. Grant attempted to impede the trial, approving a request that Babcock face a handpicked military tribunal. When that failed, Grant denied the use of plea bargaining and trades of immunity to obtain testimony against Babcock. Babcock was acquitted and Grant forced Bristow from the Cabinet and Wilson from his job. L.D. WHITE, THE REPUBLICAN ERA: 1869-1901, 367ff (1958); J. MANHEIM, DEJA VU: AMERICAN POLITICAL PROBLEMS IN HISTORICAL PERSPECTIVE 96-108 (1976).

Teapot Dome

The second widespread series of scandals was resolved through the employment of special prosecutors. While the episode is normally tagged with the name of an oil reserve located fifty miles north of Casper, Wyoming, another reserve, that in Elk Hills, California, was also involved. Authority over both was transferred from the Navy to the Interior Department after Warren Harding became President, and then the rights to develop the oil fields were secretly leased to private companies in return for payoffs. There were, as well, other scandals, unconnected to Teapot Dome, discovered contemporaneously in the Department of Justice, the Veterans' Bureau and the Office of Alien Property.

Allegations of graft and corruption in the Harding administration involving Secretary of the Interior Albert Fall began to circulate as early as April 1922. Neither the White House, the Justice Department, nor the Republican-controlled Congress demonstrated much interest in an investigation, which ultimately was spurred by Senator Thomas Walsh, a Montana Democrat.

No serious investigation of Teapot Dome took place until after Harding's death on August 2, 1923. Revelations before the Senate Committee on Public Lands and Surveys, led by Walsh, that Fall had twice perjured himself, led to calls for the appointment of outside counsel. The Department of Justice had been under considerable suspicion during the stewardship of Attorney General Harry M. Daugherty, a Harding crony, for delays and failure to obtain convictions in a number of prominent cases, for failure to enforce antitrust laws, for favoritism towards bankers, and even for collusion in the interstate transportation of boxing films. J. MANHEIM, DEJA VU: AMERICAN POLITICAL PROBLEMS IN HISTORICAL PERSPECTIVE 112 (1976).

Since Daugherty had evinced no interest in active investigation, Walsh advised Calvin Coolidge, who had succeeded Harding, to appoint special counsel to investigate and prosecute crimes arising out of the oil reserve leases. Coolidge announced that he would appoint two independent counsel, one from each party, with the consent of the Senate. While Coolidge's first two nominees were withdrawn, Atlee Pomerene, an Ohio Democrat, and Owen Roberts, a Philadelphia Republican, were then commissioned with unlimited authority to handle the prosecution of the oil leases. The day after Roberts' confirmation, Secretary of the Navy Edwin Denby resigned.

Meanwhile, Daugherty had refused to give the Senate committee certain papers in the Attorney General's office and the Senate passed a resolution initiating an investigation of the Attorney General. Coolidge then asked for Daugherty's resignation. Later it would be revealed that Daugherty had received payment from violators of the Prohibition statutes seeking to avoid prosecution, and that he had failed to prosecute graft in the Veteran's Bureau. He was ultimately tried in the Southern District of New York for conspiracy and acquitted.

Litigation by Special Counsel to set aside the leases was successful. Receiverships were established for the government to operate the wells. Roberts and Pomerene helped the District Attorney in Washington, D.C. to present evidence to the grand jury and eventually conducted the actual prosecution of criminal cases. Fall was convicted of accepting a bribe and sentenced to one year in prison and a $100,000 fine. Both Edward Doheny and Harry Sinclair, who controlled the oil companies and paid bribes, were acquitted. In all, special counsel litigated two civil suits, two contempt cases, and eight criminal trials over a period of six and one-half years. B. NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920'S (1962); W.A. WHITE, A PURITAN IN BABYLON 271-272 (1939).

The Truman Administration Scandals

The second major attempt on the Federal level to use special counsel to investigate high-level corruption in the executive branch was less successful than the Teapot Dome episode. The administration of President Harry Truman was plagued by scandals, even though Truman himself was personally honest. Opportunities for private gain abounded, as they had in the 1920s, in an uncertain postwar economy, and expanding layers of bureaucracy shielded wrongdoers. Fiercely loyal to his associates and convinced that attacks on them were aimed at him, Truman relied more on his personal judgment of people than upon evidence that might have implicated them. As a result, the Truman administration was embarrassed by problems with the Reconstruction Finance Corporation; by charges of influence-peddling against his military aide and close friend, Harry Vaughan; and by accusations of the Department of Justice being sluggish in responding to charges of electoral fraud in Kansas City.

Perhaps the most serious scandal was the disclosure of corrupt activities in the Department of Internal Revenue, including tax fixing, embezzlement and extortion. Among those implicated were Assistant Attorney General T. Lamar Caudle, head of the Tax Division of the Department of Justice, and Charles Oliphant, Chief Counsel in the Bureau of Internal Revenue. The administration conducted a half-hearted investigation, but publicity from Congressional hearings led to the dismissal of Caudle and Oliphant.

Under heavy pressure from the Congress and from others in his party, Truman first sought to name a three-member committee to investigate the scandal, but then left the matter to his Attorney General, J. Howard McGrath, former Chairman of the Democratic Party. McGrath then named a New York attorney and Republican politician, Newbold Morris, as Special

Assistant to the Attorney General, but demonstrated little interest in providing Morris with staff. When McGrath blocked circulation of a detailed questionnaire (including a complete personal financial statement) to Justice Department officials, in apparent contradiction of an executive order, Morris fought back. McGrath fired Morris. Hours later, Truman forced McGrath's resignation. No additional misconduct was exposed, although the administration did effectively reorganize the Bureau of Internal Revenue. A.D. DUNAR, THE TRUMAN SCANDALS AND THE POLITICS OF MORALITY 96-120 (1984).

Congressional Contempt Power

In 1796, the House of Representatives tried, convicted and imprisoned a private citizen on charges of congressional bribery. (Moreland, *Cong. Investigation and Private Persons*, 40 S. Cal. L. Rev., 189,190-1 (1967). In 1827, the Supreme Court in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, held that this power was inferred from the Constitution. In 1857, due to the unwieldy and time-consuming nature of contempt proceedings, Congress enacted legislation providing for executive prosecution of contumacious witnesses before Congress in the courts. Although it was not until recently that any high-ranking officials were held in contempt, Congress and the Department of Justice have recognized that this power might be used against executive officials. (*Cong. Globe*, 34th Cong., 3d Sess. 429 (1857) (remarks by Rep. H. Marshall); *The Petroleum Import Fee: Dept. of Energy Oversight*, Hearings Before the Subcommittee on the House Committee on Government Operations, 96th Cong., 2d Sess. 122 (1980) (testimony of Asst. Attorney General Hammond)). In 1927, the Supreme Court upheld the use of this power against the Attorney General's brother who had been subpoenaed as part of an investigation into whether the Department of Justice had properly handled

an antitrust investigation. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

Experience of the States

Much illumination can be shed upon the federal problem by the extensive state experience in dealing with investigation and violation of criminal laws by officials, experience which demonstrates heavy reliance upon *ad hoc* special prosecutors, often court-appointed.

It should be pointed out that law enforcement is decentralized in the states. Governors often lack control of the State Attorney General, an elected official. In turn, the Attorney General has little authority over the local district attorneys, who also are usually elected.

Certainly, the problem of prosecutors with conflicts of interest is not a new one. State courts have appointed special prosecutors where the District Attorney is suspected of a crime; where the District Attorney has a personal relationship with the target of the investigation; and where the District Attorney is unable to impartially prosecute because of an institutional relationship with the accused. Convictions won by such special prosecutors have been uniformly upheld against separation of powers attack. Often the appointment of the special prosecutor is authorized by statute — thirty-two states authorized appointment by the trial courts of general jurisdiction in 1974 — but in a substantial number, state courts have also claimed inherent power to appoint a *pro tem* prosecutor. See Dingman and Meiselman, *The Federal Special Prosecutor Act of 1974*, in *Removing Politics from the Administration of Justice*, Hearings on S. 2803 and S. 2978 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 93d Cong., 2d Sess. 351, 352, 362 (1974). The

Supreme Court of Idaho vigorously held that "it would be his [the trial judge's] bounden duty" to appoint an attorney to act in place of the district attorney where the trial judge knows or believes that there have been offenses/conduct in the administration of justice in which the district attorney is or may be involved. The Court continued:

> Reason dictates and simple justice demands that no official or individual can take part in an investigation before a grand jury, the result of which may affect him.

People ex rel *Lindsley* v. *District Court of Second Judicial District*, 29 Colo.5 (1901). The Oklahoma Criminal Court of Appeals called the power to appoint such officers "necessary for the protection and existence of the court and absolutely essential to the administration of justice and the enforcement of all our laws." It continued that it would be "an indefensible reproach upon our institutions if crimes should go unpunished for want of power in a court of general jurisdiction to appoint some one to supply the place of the regular elected officer when absent from the court or disqualified to act." *Lizar* v. *State*, 166 P.2d 119 (1946).

The New York State Experience

Experiences in one state, New York, demonstrate the critical role of special counsel in assisting all three branches in conducting investigations, and in assisting the executive and the courts in prosecutions.

Boss Tweed

Following extensive press attention in the summer of 1871 and mobilization of reform members of the bar, Charles

O'Conor was appointed special state attorney general to commence civil suits against Boss Tweed to recover stolen funds. Samuel J. Tilden, on behalf of a citizen's committee, swore out a warrant for Tweed's arrest. In Tweed's criminal trial, the local district attorney was "assisted" by two lawyers representing Special State Attorney General O'Conor. In fact, they conducted the case. Tweed was convicted of 102 offenses. In the civil suit, tried by O'Conor, the jury brought in a verdict against Tweed for over six million dollars.

In addition, information on the judges corrupted by the Tweed ring among others was gathered by a committee of the Association of the Bar of the City of New York and given to the New York Assembly. At hearings of the Assembly Judiciary Committee, the Association of the Bar was represented by three members. In an impeachment proceeeding, members of the Association were employed by the Assembly. G. MARTIN, CAUSES AND CONFLICTS 65-119 (1970).

The Seabury Investigations

One of the most notable examples of the use of special counsel to root out municipal corruption in American history were the efforts of Samuel Seabury, who from 1930 to 1932 was engaged in investigations for all three branches of New York State government.

In the fall of 1930, Governor Franklin D. Roosevelt, under considerable public pressure, called for an extraordinary term of the New York State Supreme Court to investigate the Magistrates' courts in the Bronx. The Court designated Seabury as referee (investigating counsel). During eight months of public hearings 291 witnesses were examined. At first exposing a racket in which women were framed as prostitutes by police, bondsmen, lawyers, court clerks and magistrates, Seabury

used the hearings to demonstrate how Tammany district leaders interceded with the magistrates for favors. Two magistrates were removed from the bench in proceedings in which Seabury participated. Three more resigned and sixteen lawyers were disbarred.

While the magistrates' investigation was progressing, Governor Roosevelt in March 1931 appointed Seabury as commissioner to investigate and report on charges filed against the New York County District Attorney, Thomas C.T. Train, who had never acted to uncover the crimes and misfeasance Seabury was exposing. Seabury eventually reported that evidence was insufficient to warrant Train's removal, but the investigation revealed that there were very few businesses in the city that were not the prey of racketeers seeking bribes, payoffs and shakedowns.

Then, in April 1931, a committee of the New York State Legislature appointed Seabury as its counsel to investigate New York City government. These thorough investigations uncovered bank accounts running into millions of dollars, held by city officials on salary. Seabury traced the framework of corruption through all five boroughs of the city and revealed that the Manhattan Tammany leaders received a cut from almost every conceivable governmental function. The investigations led to the removal of the Sheriff of New York county, who had accumulated nearly $400,000 within six years on an annual salary of $8,500 (which he ascribed to a magical "tin box").

By the time the investigation reached the door of the City's popular mayor, Jimmy Walker, Governor Roosevelt, who was then seeking the Democratic Presidential nomination, procrastinated. Seabury recommended Walker's removal from office and kept the pressure on Roosevelt, who was able

to delay until after the Democratic convention the hearing which would lead to the Mayor's resignation. H. MITGANG, THE MAN WHO RODE THE TIGER 159-310 (1963); G. MARTIN, CAUSES AND CONFLICTS 227ff (1970).

Dewey as Special Prosecutor

In 1935 a grand jury, seeking to attack racketeering and civic corruption, revolted against the Tammany District Attorney of New York County, William Copeland Dodge, finally prohibiting Dodge and his assistants from conducting the grand jury proceedings. After subpoenaing witnesses on its own, the grand jury demanded that Dodge appoint a Special Prosecutor of their choice. Dodge agreed in principle, but refused to choose any of the six names the jury gave to him. The grand jury then called for a special term of the city's Supreme Court to hear evidence and vote indictments and for a Special Prosecutor appointed by Governor Lehman, who agreed reluctantly to the request, and appointed Dewey, a potential political rival.

Technically, Dewey was Deputy Assistant District Attorney under Dodge, but he assembled a brilliant staff including Murray I. Gurfein, Stanley H. Fuld, Charles Breitel, Edward McLean, William B. Herlands, and Frank Hogan. Dewey brought a frontal attack on organized crime, including all forms of racketeering, bail bonding, and political protection. Thirty-six loan sharks were convicted.

Then Dewey turned his attention to racketeering in prostitution. The notorious Lucky Luciano was sentenced to thirty to fifty years for that crime. Finally, Dewey turned to the industrial rackets — extortion in the garment industry, the bakery industry, the poultry and poultry trucking industry. Over and over the same pattern was repeated: books were

seized in a raid; tax evasion threatened; victims convinced to talk; convictions obtained. R.N. SMITH, THOMAS E. DEWEY AND HIS TIMES 147-226 (1982); T.E. DEWEY, TWENTY AGAINST THE UNDERWORLD 149ff (1974).

Special Prosecutors of the Early 1970s

In two highly celebrated instances in the early 1970s special prosecutors were employed in New York State — one for fact-finding and one for prosecution.

Two days after the end of a prison riot in Attica, N.Y., Governor Nelson Rockefeller and the leaders of the state legislature asked Chief Judge Stanley H. Fuld of the New York Court of Appeals and the four presiding justices of the Appellate Division to appoint a citizens' commission to investigate facts leading up to, during, and following the riots. At the time, jursdiction over the criminal aspects of the uprising was left to the Deputy Attorney General, but a special prosecutor was ultimately employed at the recommendation of the Commission, which was chaired by New York University School of Law Dean Robert McKay. THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA xxiii-xxiv (1972).

In 1972 Governor Rockefeller appointed Maurice H. Nadjari Special Prosecutor to investigate corruption in the New York City criminal justice system, superseding New York City's five district attorneys on matters relating to corruption. Rockefeller stated that:

> Under the present circumstances only an independent agency with citywide authority, assigned a clear and specific mission and armed with full prosecutorial power and independent investigative capacity can break through the natural resistance of government

agencies to investigate themselves or their close allies.

Nadjari, *New York State's Office of the Special Prosecutor: A Creation Born of Necessity*, 2 HOFSTRA L. REV. 97,102 (1974).

CONCLUSION

Review of the historical record shows that the investigation and prosecution of criminal offenses has never been an exclusive function of the executive. The authority to appoint a special prosecutor has shifted to meet the necessities of each situation and in particular the special problem of conflict of interest in the executive branch. In some cases the appointment has been by the executive; in others by the legislature; in others by the courts — in the case of Samuel Seabury, by *all three*. The method of appointment provided for under the present Independent Counsel statute has a respectable lineage for which no one need apologize, and one which cannot properly be characterized as inconsistent with our constitutional heritage.

No. 87-1279

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL
CLERK

IN THE

Supreme Court of The United States

October Term, 1987

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Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS, and CAROL E. DINKINS,
Appellees.

On Appeal From the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN

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March 9, 1987

CASILLAS PRESS, INC., 1000 CONNECTICUT AVE., N.W., WASHINGTON, D.C. 20036

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BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

Public Citizen is a nonprofit, public interest organization which is currently supported by the contributions of approximately 60,000 members. Since its founding in 1971, one of its principal objectives has been assuring government accountability — the precise purpose of the Independent Counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 591-598 ("the Act").

Public Citizen also has a long history of involvement in separation of powers issues. On behalf of itself and other individuals and organizations, it has filed cases and *amicus* briefs

in a wide variety of litigation, including recent separation of powers cases resolved by this Court, *see Bowsher v. Synar*, 106 S. Ct. 2735 (1986); *INS v. Chadha*, 463 U.S. 919 (1983), as well as the early impoundment cases. *See, e.g., Train v. City of New York*, 420 U.S. 35 (1975).

In addition, Public Citizen is currently litigating several other major separation of powers cases. *See Public Citizen v. Burke*, 655 F. Supp. 318 (D.D.C. 1987) (appeal pending) (invalidating a rule requiring the National Archives to defer to all claims of executive privilege asserted by former President Nixon); *United States v. Arnold*, Crim. No. 87- 1279-B (S.D. Cal. Feb. 18, 1988) (declaring sentencing guidelines promulgated by the United States Sentencing Commission invalid as a violation of the separation of powers doctrine); *Washington Legal Foundation v. Dep't of Justice*, Civ. No. 86-2883 (D.D.C.) (challenging government's contention that application of the Federal Advisory Committee Act to the American Bar Association's Judicial Evaluation Committee would violate separation of powers principles).

Thus, both because of its institutional concern with government accountability, and because of its involvement in cases raising separation of powers questions, Public Citizen has a unique interest in, and perspective on, the issues in this case.

SUMMARY OF ARGUMENT

In assessing the constitutionality of the Act, it is vital to comprehend what the statute actually permits and requires, as well as the real-world roles performed by the Office of Independent Counsel, the Special Division of the Court, the Attorney General, and the Congress, with respect to investigations and prosecutions of high-level federal officials. That information is fully detailed in appellant's brief and will not be repeated

here. Nor will we attempt to engage in a point-by-point refutation of the arguments advanced by appellees and in the majority opinion below. Rather, we will focus on the key flaws in the court of appeals' analysis of the Act.

In our view, the most fundamental error made by the court of appeals is that it failed to recognize that its "task is not to destroy the Act if [it] can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973). Thus, in virtually every instance where there is any doubt about the meaning of a particular provision of the Act, the court of appeals employed the interpretation most likely to do violence to principles of separation of powers, and assumed that Congress' motive was to undermine the authority of the President and the Attorney General. Moreover, the court reached out to consider hypothetical applications of various provisions of the Act that have nothing to do with this case, and it concluded that each allegedly objectionable feature, no matter how peripheral to the Act as a whole, or how speculative its application, condemned the entire statute to a verdict of unconstitutionality.

The other major error committed by the majority below is that it largely ignored the leading cases from this Court which analyze the separation of powers doctrine in a situation where, as here, Congress has not attempted to usurp executive branch powers, but has merely passed a statute which regulates the exercise of those powers. *See Nixon v. General Services Administration*, 433 U.S. 425 (1977); *see also Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986). As recognized in Judge Ginsburg's dissent, the Act represents Congress' effort to ensure that, in the narrow circumstances where the Attorney General may be biased or perceived to be biased because of his close association with persons ac-

cused of criminal behavior, there is still an effective mechanism to "take Care that the Laws be faithfully executed . . .." U.S. Const. Art. II, § 3. Because, as we explain more fully below, the mechanism selected by Congress is consistent with both the general doctrine of the separation of powers, and the specific dictates of the Appointments Clause, the Act must be upheld.

ARGUMENT

THE INDEPENDENT COUNSEL ACT IS CONSTITUTIONAL.

A. The Independent Counsel Law Does Not Contravene Any Specific Provisions of the Constitution.

Before turning to the question of whether the Act offends general separation of powers principles, we wish to make a few points with respect to the court of appeals' rulings that the statute contravenes both the Appointments Clause and Article III of the Constitution.

1. The Act Does Not Violate The Appointments Clause.

In assessing whether the Act is consistent with the Appointments Clause, the Court should, of course, begin with the language of the Constitution itself. The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law:

> but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2. Since independent counsels are not discussed in the Clause, and since Congress is given wide discretion in determining the method of appointment for officers not specifically mentioned, the court of appeals was required to read restrictions into the Clause in order to find that the Act's procedure for appointing independent counsels is unconstitutional. The principal restriction which the court read into the Clause is that Congress did not have the power, in crafting the Act, to conclude that independent counsels are "inferior officers," and thus to select a method of appointment other than Presidential appointment and Senate confirmation.

In analyzing whether independent counsels can be inferior officers, however, the majority below unnecessarily limited its analysis to just two possible interpretations of the Appointments Clause. Initially, the court rejected, properly we believe, the contention that the only officers who must be appointed with the advice and consent of the Senate are those officers delineated in the first part of the clause, *i.e.*, Supreme Court Judges, Ambassadors, other Ministers, and Consuls. The court of appeals discarded this approach primarily because it would allow Heads of Departments and Courts of Law — who, under the last part of the clause, may be vested with the power to appoint inferior officers — to be themselves designated as inferior officers.

Having identified an apparent incongruity in one possible approach to the Clause, the court simply leaped to an interpretation at the other extreme — that, in addition to those per-

sons listed in the first part of the Clause, all officials must be appointed pursuant to the advice and consent process as long as they are not, in the view of a reviewing court, "thought subordinate to a principal officer." Slip op. at 17. The court of appeals made no effort to explain how this "functional interpretation" of the Clause, *id.*, is consistent with the language of the Clause itself, which authorizes the members of Congress, not the courts, to decide the method of appointment of "such inferior Officers as they think proper." Moreover, the majority below attempted to reconcile its interpretation with *Ex parte Siebold*, 100 U.S. 371 (1888), by simply asserting that the election officials involved there — who were not subordinate to any principal officer — performed duties that were "relatively modest," while "the independent counsel's authority is so broad as to compel the conclusion that she is a principal officer . . .." Slip op. at 21. The court's failure to articulate any objective standards for distinguishing between "modest" and "broad" duties suggests that its "functional" approach amounts to little more than free-floating, judicial second-guessing of Congress' determination of how a particular appointment should take place.

The court of appeals functional test is also inconsistent with its rejection of another argument advanced by appellant below — that the Attorney General has granted parallel appointments to other independent counsels, and these appointments have been sustained by the court of appeals. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, No. 87-869 (Jan. 19, 1988). As the United States has noted, such parallel appointments grant independent counsels the "*full authority* conferred by their court appointments." Court of Appeals Brief of United States at 2 (emphasis added). It is difficult to see how, under a "functional" approach to the Appointments Clause, which focuses primarily on the "magnitude of the task" performed by a particular official, slip op. at 23, an independent counsel appointed by a court can be labeled a principal officer, while another independent counsel, performing functionally identical tasks, but appointed by the Attorney General, can be deemed an inferior officer.

Unfortunately, the court of appeals failed to consider seriously the most plausible and straightforward construction of the Appointments Clause. Under this approach, the officers listed in both the first and last parts of the clause, *i.e.*, Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court and the Courts of Law, and the Heads of Departments, must be appointed by the President with the advice and consent of the Senate. Such an approach is clearly compatible with the language of the Clause and also eliminates the anomaly perceived by the court of appeals, in which an inferior officer can be given the power to appoint other inferior officers.

As to all other officials, Congress has considerable latitude in determining which method of appointment it "think[s] proper" for the legislative scheme being crafted — in other words, whether the advice and consent process is needed or whether a particular appointment should be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." Moreover, far from being the Congressional aggrandizement of power perceived by the majority below, such a decision amounts to a relinquishment by Congress (or, more precisely, the Senate) of its advice and consent function.

In a footnote, the court of appeals dismissed this approach to the Appointments Clause, calling it a misguided suggestion that the courts "defer to Congress' interpretation of the Constitution . . .." Slip op. at 23 n. 20. But that characterization misses the point: that the Framers themselves decided to "defer to" Congress' method of selection of all officials other

than the principal officers actually enumerated in the Clause. It is not, therefore, Congress' "interpretation of the Constitution" which the courts should respect, *id.*, but, rather, Congress' exercise of the discretion that is granted to it by the plain language of the Appointments Clause. Instead of deferring to Congress' reasonable exercise of discretion in this case, the court of appeals simply discarded Congress' choice in favor of its own preference for the appointment of independent counsels — a preference which is predicated on an inherently subjective, "functional" test that simply has no grounding in the language or background of the Appointments Clause itself.

Moreover, the fact that a particular appointment process is permitted by the language of the Appointments Clause does not, contrary to the court of appeals' suggestion, give Congress the "final say" in cases of constitutional adjudication. Slip op. at 23. The appointment issue must still be considered, along with all other aspects of the statute under review, in assessing whether there is so significant a shift in the balance of power among the branches of government as to amount to a subversion of the separation of powers contemplated by the Framers of the Constitution. As Judge Ginsburg noted in her dissent, "[a]n inter-branch appointment would indeed fail the test of congruity [suggested by this Court in *Siebold*, *supra*] if it violated the separation of powers doctrine." Slip op. at 34. But, as noted earlier, a decision by Congress to give up its advice and consent power, and instead vest the authority to appoint in the President alone, or in another executive or judicial official, is unlikely to offend the principles underlying the separation of powers doctrine. And, as we will explain more fully below, *see infra* at 16-25, the legislative scheme at issue here, when viewed as a whole, plainly does not run afoul of those principles.

2. The Act Does Not Violate Article III.

Appellees argued below, and the court of appeals held, that the Act violates Article III of the Constitution by imposing non-judicial duties on the federal judiciary. In essence, the court found that federal courts are permitted only to decide "cases or controversies," but that the Act requires a special court to undertake activities which are divorced from that core judicial function. Slip op. at 75.

As noted above, however, the Constitution explicitly provides that, in addition to deciding "cases or controversies," courts may, when directed by Congress, appoint inferior federal officers. Art. II, § 2, cl. 2. And this Court has recently held that courts may also, in some circumstances, appoint prosecutors even when Congress has not authorized such appointments. *See Young v. United States*, 107 S. Ct. 2124 (1987). Moreover, the powers on which appellees and the court below have focused — the definition of the independent counsel's jurisdiction and the termination of the independent counsel's office following completion of an investigation — are logical adjuncts of the power of appointment. It is difficult to fathom a reason, and neither the court below nor appellees have made any effort to offer one, why the Framers would allow a court to create a federal office by appointing an independent counsel, but foreclose it from playing any role in defining the independent counsel's jurisdiction pursuant to a request made by the Attorney General, or in terminating the office it created.

Tellingly, the United States, in its brief below, acknowledged that courts may "discharge non-judicial functions" in the course of managing "judicial business" under Article III, Court of Appeals Brief of United States at 41, yet it nowhere explained why courts cannot discharge functions which are related to, and in support of, their Article II appointment powers, as they do under the Act. The United States has also never ex-

plained how it can reconcile its Article III stance in this case with its views of other recent statutory schemes, most notably the statute that creates the United States Sentencing Commission and directs it to establish binding guidelines for sentencing persons convicted of federal crimes. That statute specifically requires that "[a]t least three of the [seven] members [of the Commission] shall be Federal judges," and also states that "[a] Federal judge [may] serve as a member of the Commission without resigning his appointment as a Federal judge." 28 U.S.C. §§ 991, 992.

In a letter to the Chairman of the Sentencing Commission, the Justice Department's Office of Legal Counsel analyzed the constitutionality of the Sentencing Commission, and concluded that, although its "functions plainly are not judicial in nature," it is still "constitutionally permissible" because "service by an active federal judge as an officer in the executive branch is consistent with the constitutional principle of separation of powers." (The relevant portion of the memorandum is included in the Addendum to this brief). The Justice Department is now defending the statute on that basis, in response to constitutional attacks by defendants in criminal cases. *See, e.g.*, Brief of United States at 17-18, *United States v. Molander*, No. 88-CR-2-S (W.D. Wis. Brief Filed, Feb. 26, 1988). If federal judges may sit on executive commissions and issue substantive, binding rules governing sentences for all persons convicted of federal offenses, it is difficult to see how the Constitution can be violated if judges are involved in appointing independent counsels, fixing the precise terms of their jurisdiction in accordance with the Attorney General's request, and ordering the termination of their offices when their work is completed.

Finally, as in its analysis of almost all of the issues, the court of appeals' consideration of the Article III question is flawed

by its willingness to reach out and rule on potential applications of the Act that not only have no concrete relationship to this case, but which represent extreme, worst-case hypotheticals of such applications. For example, the court of appeals postulated that, under section 596(b)(2) of the Act, the Special Division could "terminate, perhaps abruptly, the entire office, to disavow all the independent counsel's efforts and halt ongoing proceedings . . . ." Slip op. at 82. Obviously, that has not occurred in this case or in any other independent counsel investigation that has been undertaken to date. Nor is it likely that the Division will ever be called on to abruptly terminate the activities of a "runaway" independent counsel, yet the majority below saw no impediment to condemning the Act on that basis. *Id.* As this Court has noted, however, it is far "wiser to delay passing upon the constitutionality" of such an extreme application of a statute until it actually transpires — if it ever does. *Watson v. Buck*, 313 U.S. 387, 402 (1941). In short, this Court should not be willing, as was the court of appeals, to render what is equivalent to "an advisory opinion on a statute or a declaratory judgment upon a hypothetical case." *Id.*[1]

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[1]The court of appeals' belief that its approach is countenanced by *Bowsher v. Synar*, 106 S. Ct. 3181 (1986),is misplaced. Slip op. at 81-82. In that case, this Court held that the prospect of Congressional removal of the Comptroller General created a "here-and-now" subservience. *Id.*, 106 S. Ct. at 3189. In this case, in contrast, the Special Division cannot remove an independent counsel, and it makes no sense to suggest that, because the Division could conceivably take the drastic step of terminating the office of a "runaway" independent counsel, then all independent counsels must have a "here-and-now" subservience to the Division. Moreover, appellees have not argued, nor can they, that the Division's theoretical role in terminating maverick independent counsels has had any effect whatsoever on the activities of appellant, let alone that she has taken some action with respect to them that she would not otherwise have taken in the absence of the Division's responsibilities under the Act.

B. The Act Does Not Violate The Doctrine of Separation of Powers.

1. The Principle of Separation of Powers

In arguing that the Act offends the doctrine of separation of powers, appellees and the United States have relied on what this Court has characterized as an "archaic view of the separation of powers . . . requiring three airtight departments of government." *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 442. In essence, the court of appeals found that, because prosecutorial functions are assigned by the Constitution solely to the executive branch, they are entirely immune from any form of control by Congress, even through duly enacted statutes of general applicability. But that antiquated approach to the separation of powers doctrine has been rejected as "inconsistent with the origins of th[e] doctrine, recent decisions of the Court, and the contemporary realities of our political system." *Id.* at 441. Instead, this Court has developed a "pragmatic, flexible" approach which has two related themes. *Id.* at 442; *see also United States v. Nixon*, 418 U.S. 683, 707 (1974).

First, the Court has consistently guarded against "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). Accordingly, in *every* case in which the Court has found a separation of powers violation, one branch of government has attempted to usurp powers which have been vested by the Constitution in another branch. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-588 (1952), the Court held that the President could not exercise legislative authority belonging only to Congress. Likewise, in a series of cases — which were erroneously relied on by appellees and the court of appeals — the Court held that Congress cannot

enact laws, while keeping for itself the power to participate in the execution of those laws, either by retaining a veto over their implementation, *INS v. Chadha*, 462 U.S. 919 (1983), or by reserving for itself the power of removal of the officer charged with executing them. *Bowsher v. Synar*, *supra*, 106 S.Ct. at 3188; *see also Myers v. United States*, 272 U.S. 52 (1925) (conditioning removal of executive branch official on Senate approval is unconstitutional); *Buckley v. Valeo*, *supra* (Congress cannot attempt to control the execution of the laws by appointing executive branch officials itself).

It is clear, therefore, that this Court has been primarily concerned with the excessive concentration of power in the hands of one branch of government, and has specifically sought to prevent Congress from "[giving] power to the executive and then [taking] it back . . .." *Ameron, Inc. v. Army Corps of Engineers*, 809 F.2d 979, 994 (3d Cir. 1986). However, where, as here, Congress has not attempted to usurp executive power, but has merely enacted laws which set standards for the exercise of that power, this Court has taken an entirely different, and far less rigid approach, to the separation of powers doctrine. Thus, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court upheld a statute which permitted the President to remove an executive branch official only for inefficiency, neglect of duty, or malfeasance in office," and in *Bowsher v. Synar*, the Court noted that its ruling was not intended to cast doubt on the validity of statutes limiting the reasons the President may remove members of independent agencies. 106 S. Ct. at 3188 n.4.

The leading case that analyzes the separation of powers doctrine in the context of a statute that regulates, but does not usurp, executive functions is *Nixon v. GSA*, *supra*, which was first cited by the majority opinion below on page 58 and essentially ignored thereafter. That case involved President Nix-

on's challenge to a statute that intrudes far more into the executive branch than the independent counsel provisions of the Ethics in Government Act. In enacting the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note (the Materials Act"), Congress required the National Archives to take "possession and control" of all tape recordings and documents of the Nixon Administration and to develop regulations providing for public access to those materials with certain limited exceptions. *Id.*

Relying on essentially the same view of the separation of powers doctrine which the court of appeals accepted here, President Nixon contended that Congress could not regulate the disposition of his papers because the three branches of government are "totally distinct and autonomous, and . . . the separation of powers doctrine bars action by one branch that even indirectly impinges upon another." *Nixon v. GSA*, 408 F. Supp. 321, 341 (D.D.C. 1976) (three-judge court). However, that formulation was rejected by the Court, which instead endorsed a pragmatic balancing test:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S. at 711-712 . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443. Refraining from considering "future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents,"

the Court found that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." *Id.* at 445. Reinforcing this finding, according to the Court, was the fact that President Ford had signed the Materials Act into law, as well as the fact that implementation of the Act was committed, in the first instance, to an executive branch official, the Administrator of GSA. *Id.* at 441. Moreover, the Court found that "substantial public interests" were furthered by the Materials Act, including preservation of the "[Nixon] materials for legitimate historical and governmental purposes," as well as the need to

> restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant's resignation, and Congress' need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation.

Id. at 453. Because Congress' legitimate interests in passing the Materials Act easily outweighed any interference with executive branch functions, the Court concluded that there was no violation of the separation of powers doctrine.

Recently, in *Commodity Futures Trading Comm'n v. Schor*, *supra*, this Court reaffirmed the approach taken in *Nixon v. GSA*. That case involved a statute bearing on judicial rather than executive power, but the Court engaged in essentially the same analysis as it did in assessing the constitutionality of the Materials Act. Thus, the Court stressed that, "[u]nlike *Bowsher*, this cases raises no question of the aggrandizement of congressional power at the expense of a coordinate branch." 106 S. Ct. at 3261. Accordingly, the Court considered whether the statute excessively "intrude[d] on the province of the judiciary," and, finding that it did not, concluded that there

was no "genuine threat" to separation of powers principles. *Id.* at 3258, 3261.

As we now demonstrate, because the same basic factors that persuaded this Court to uphold the statutes at issue in *Nixon* and *Schor* are present here, the Court should conclude that the Independent Counsel Act also does not violate the doctrine of separation of powers.

2. Congress Has Not Usurped Any Executive Branch Powers.

To begin with, this is plainly not a case in which Congress has attempted to usurp executive power. Nothing in the Act authorizes Congress to exert any control, either directly or indirectly, over executive branch functions. Under the statute, Congress does not participate in the appointment or removal of independent counsels, nor does it retain any control over the scope or outcome of investigations or prosecutions. In fact, Congress' role is expressly restricted to routine oversight functions of the kind that it undertakes on an almost daily basis with regard to all federal agencies, including the Department of Justice. *See* 28 U.S.C. § 595. No plausible argument can be constructed that this oversight function alone constitutes legislative encroachment on executive branch activities, and thus the core factor which has triggered *every* Supreme Court finding of a separation of powers violation is simply not present here.

In an effort to avoid this conclusion, the court of appeals advanced an argument that actually highlights the inconsistency between its rigid approach to the separation of powers doctrine and the more flexible view which has been taken by this Court. Thus, while acknowledging that the Act does not directly add to any of Congress' powers, slip op. at 66, the court went on to opine that:

> it seems simplistic to contend that Congress' political power in our system is unaffected by a diminution (or increase) in the Chief Executive's authority. If the President's authority is diminished — and we think it utterly impossible to deny that the Act accomplishes at least that result — Congress' political power must necessarily increase vis-a-vis the President.

Id. at 67. But that analysis can obviously be applied to *any* law that regulates or influences executive authority, and thus it would, if accepted, compel invalidation of numerous statutes which this Court has heretofore found to be compatible with the doctrine of separation of powers. For example, in the course of upholding the Materials Act in *Nixon v. GSA*, the Court noted that, "of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch" — such as the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Records Act, and a variety of other statutes — and "[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." 433 U.S. at 445. Under the court of appeals' analysis, however, all of these statutes, as well as the Materials Act itself, must be regarded as diminishing executive branch discretion to withhold its materials from the public, and thereby impermissibly increasing "Congress' political power . . . vis-a-vis the President." Slip op. at 67. It could hardly be clearer that the court of appeals' approach to the separation of powers doctrine is completely out of sync with the precedents and principles that have been established by this Court on the issue of Congressional aggrandizement.

3. Implementation Of The Act Is Committed To The Executive Branch.

As in *Nixon v. GSA*, implementation of the Act is committed to the executive branch. Thus, only the Attorney General can apply for appointment of an independent counsel, and he is required to do so only if he determines that (1) the investigation concerns either a high government official specifically enumerated in the Act or another government official whose investigation or prosecution by the Justice Department may present a personal, financial, or political conflict of interest; (2) there is sufficient credible information to undertake a preliminary investigation; and (3) there are reasonable grounds to conclude that further investigation and prosecution is appropriate. 28 U.S.C. §§ 591, 592. If, after completing a preliminary investigation, the Attorney General finds that "there are no reasonable grounds to believe that further investigation or prosecution is warranted . . . the division of the court shall have no power to appoint an independent counsel." *Id.* at § 592(b)(1). In the course of amending the Act in 1987, Congress made it crystal-clear that the "Attorney General's determinations under the [Act] are not subject to judicial review." H. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987).

Simply stated, an independent counsel cannot even exist unless the Attorney General, an executive branch official, makes several separate determinations which fall entirely within his discretion. Likewise, the Attorney General alone is authorized to remove an Independent Counsel from office, although such removal must be based on "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.* at § 596(a). Moreover, although appellant is not subject to the day-to-day control of the Attorney

General, she is required to "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f). Accordingly, while the statute does not explicitly say so, independent counsels are properly regarded as members of the executive branch, as the court below acknowledged. Slip op. at 20, 50. Indeed, the Justice Department admitted as much when, in 1987, it attempted to require all independent counsels to comply with conflict of interest rules applicable to officials within the Department. *See* H.R. Rep. No. 316, 100th Cong., 1st Sess. 29 (1987) ("House Report").

Overall, therefore, the only substantive role that any branch of government (outside the executive branch) has in the entire Act involves the power of the special court to actually name an independent counsel and fix his or her jurisdiction. However, because the court must name an independent counsel whenever the Attorney General requests that it do so and may not make an appointment in the absence of such a request, 28 U.S.C. § 593(b), and because the definition of the counsel's mission must be based on information submitted in the Attorney General's application, *id.* at § 592(d)(1), the court's tasks are largely ministerial and pale in comparison with the important, discretionary responsibilities assigned to the Attorney General. Moreover, since, under *Young v. United States*, *supra*, federal courts have the inherent power to appoint private attorneys to prosecute contempt actions, even where the executive branch declines or opposes prosecution, then it certainly does not violate the separation of powers doctrine for a special court, acting pursuant to statutory directives, to appoint an independent counsel where the Attorney General expressly requests such an appointment.[2]

[2]In light of *Young*, it is also clear that the court of appeals was wrong in asserting that "the Constitution vests the power to initiate a criminal prosecution exclusively in the Executive Branch." Slip op. at 26.

Thus, as in *Nixon v. GSA*, the executive branch remains firmly in control in implementing the statutory scheme at issue. As a result, the only arguable claim that may be advanced by appellees is that there is improper impairment of the Attorney General's power because independent counsels operate largely autonomously in the actual investigation and prosecution of offenses. We do not suggest, of course, that the Act causes *no* diminution of the Attorney General's authority, but, as *Nixon* and *Schor* make clear, that is not the proper test. Rather, the Court must examine the extent of the impairment, balance it against the interests served by the law, and ultimately determine whether the intrusion into executive branch functions is excessive. If that test is applied here, the Act must be sustained.

First, the diminution of the Attorney General's power is small because independent counsels can be appointed only to investigate and prosecute certain offenses committed by a narrow class of officials, and only following a request by the Attorney General. In addition, independent counsels can pursue only specific, discrete investigations, and their offices are terminated once those investigations are completed. Any intrusion which is occasioned by such limited investigations "can only be termed *de minimis*." *Commodity Futures Trading Comm'n v. Schor*, *supra*, 106 S. Ct. at 3260 (1986).

In addition, just as this Court deemed it noteworthy in *Nixon v. GSA* that President Ford had signed the Materials Act into law, 443 U.S. at 441, it is likewise probative that President Carter approved the Act.[3] It is also significant that, as the United States tacitly acknowledges, President Reagan

[3]Contrary to the court of appeals' implication (slip op. at 63), the majority of both Houses of Congress was from the same party as President Carter when the Act was first passed in 1978.

and the Department of Justice have endorsed independent investigations in all of the cases currently being pursued by independent counsels, even to the point of offering them parallel appointments under which they can "enjoy the *full authority* conferred by their court appointments." Court of Appeals Brief of United States at 2 (emphasis added). While the appellant declined such an appointment here, the fact that the Justice Department was — and remains — willing to give her the identical authority that she has under the Act, demonstrates that the statute has not, to date, operated in a fashion that interferes with executive branch prerogatives. Of course, there may come a time when a particular investigation is not so favorably regarded by incumbent executive officials, but such "hypothetical horrors" are not presently before the Court. *Nixon v. GSA*, *supra*, 408 F. Supp. at 341.

At bottom, the Act intrudes far less into executive branch functions than the statute at issue in *Nixon v. GSA*. In contrast to the Materials Act, which imposes sweeping, mandatory duties on executive branch officials, the Act is a narrowly drawn and carefully crafted statute which intrudes on executive operations to the minimum extent necessary to achieve its legitimate objectives. As we now demonstrate, the public interests served by the statute are at least as compelling as those furthered by the Materials Act, and Congress reasonably concluded that they could not be accomplished without the safeguards contained in the Independent Counsel law.

4. Congress Reasonably Determined That The Act Serves Substantial Public Interests.

Following the Watergate abuses, including the abrupt dismissal of special prosecutor Archibald Cox, Congress held extensive hearings and concluded that "[n]o one who has watched 'Watergate' unfold can doubt that the Justice Depart-

ment has difficulty investigating and prosecuting high officials, or that an independent prosecutor is freer to act according to politically neutral principles of fairness and justice." S. Rep. No. 170, 95th Cong., 2d Sess. 3 (1977) ("Senate Report"), *quoting Watergate Special Prosecution Force Final Report* at 137-138. Moreover, Congress wanted investigations of high government officials to conform to the "basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest," and, by the same token, it wanted to alleviate the "harm to the morale and self-esteem of the employees of the Department" of Justice which "is caused when the senior attorneys in the Department feel compelled to act in the face of a conflict of interest instead of abstaining as our normal principles of ethics require." Senate Report at 7. Finally, Congress was convinced that the "mere existence" of the Act could "act as a substantial deterrent to extreme situations such as Watergate," and could thereby help in restoring public confidence in government. *Id.*

This Court's recent decision in *Young v. United States*, *supra*, confirms the importance of the interests served by Act. In reaffirming that federal courts may appoint private attorneys to prosecute criminal contempt actions, the Court reasoned that "[i]f the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that branch declined prosecution." 107 S. Ct. at 2134. The rationale for the appointment of independent counsels is at least as powerful; Congress has determined that the nation cannot be entirely dependent on high executive officials to investigate and prosecute crimes where there is an actual or potential conflict of interest.

Indeed, another facet of the Court's ruling in *Young* highlights this very concern. While the Court found that courts have the authority to appoint private attorneys to prosecute

contempt actions, it also concluded that courts may not assign that responsibility to interested parties. *Id.* at 2135. Such assignments "at a minimum create[] *opportunities* for conflicts to arise, and create[] at least the *appearance* of impropriety." *Id.* at 2137 (emphasis in original). Moreover, *Young* held that the appointment of an interested person as a prosecutor is an error that is "so fundamental that [it] require[s] reversal [of the underlying criminal conviction] without regard to the facts or circumstances of the particular case." *Id.* at 2139.

Employing identical reasoning, Congress has concluded that investigations and prosecutions of high government officials must be conducted by persons who have no interest in the matter under scrutiny, *i.e.*, persons who can operate with some degree of independence from the Attorney General and the Department of Justice. Thus, the rules which Congress has laid down for independent counsels stem from essentially the same interests as the rules which this Court has ordained with regard to the appointment of special counsels to prosecute criminal contempt.

Congress' concern with conflicts of interest, as well as the appearance of such conflicts, also led it to conclude that the use of an independent counsel who is "free from any conflict of interest would result in public acceptance of a decision not to prosecute that may be entirely justified on the merits . . ." Senate Report at 10. Accordingly, the law safeguards the public reputation of *targets* of independent counsel investigations who are not subsequently prosecuted, whereas "the same decision made by the Attorney General who has a conflict of interest, or the appearance thereof, might breed public distrust of the decision not to prosecute," as well as suspicion about the individual who is not prosecuted. *Id.* By way of illustration, it is unlikely that the incumbent Attorney General would have been confirmed for his position if, in 1984, an in-

dependent counsel had not cleared him of criminal wrongdoing in connection with various financial transactions. *See* House Report at 16.

In rejecting Congress' determination that the Act is needed, the court of appeals committed several significant errors. First, rather than respond to Congress' specific finding that the Justice Department has had, and will continue to have, difficulties in investigating and prosecuting high executive branch officials, the court instead elected to merely define away the problem that Congress was striving to solve. Thus, without providing any explanation, the court asserted that an investigation by officials in the Justice Department into potential illegalities committed by their own colleagues is not "truly a conflict of interest . . . as we judges and lawyers think of the phrase." Slip op. at 61. But, more importantly, the court's reflection on what "judges and lawyers think of" as a conflict of interest does not eliminate either the real-world problem that Congress was attempting to attack, or the fact that the Act represents an effective — perhaps the only effective — response to that problem.[4]

Equally objectionable is the court's rejection of Congress' conclusion that "structural techniques" like the Act can help

[4]Ironically, while belittling Congress' concern with avoiding conflicts of interest in the executive branch, the court of appeals incorporated virtually the same concern into its Article III analysis. Thus, in concluding that the establishment of a Special Division is "particularly troubling," the majority below raised the specter of a defendant "offending the [reviewing] court by pointing too vigorously to alleged overreaching by fellow judges or by an officer appointed by and supervised by fellow judges." Slip op. at 86. It is difficult to understand why the "possible influence of this court's respect for its colleagues [on the Special Division]" constitutes a grave problem, slip op. at 86, yet the "possible influence" of the Attorney General's "respect" for his colleagues on the investigation and prosecution of alleged criminal behavior does not represent such a problem.

to prevent "national nightmare[s]" such as Watergate. Slip op. at 62. Even though Congress conducted extensive hearings and concluded that the existence of the Act would, in fact, "act as a substantial deterrent" to lawlessness in the executive branch and even to "extreme situations like Watergate," Senate Report at 7, the majority below, without even reviewing the testimony and materials considered by Congress, simply declared that *it* did not agree with this rationale for the Act.

Likewise, the Court's pronouncement that "prosecuting Presidents" cannot "be made relatively painless," slip op. at 63, ignores Congress' determination — again based on extensive testimony and factual exploration — that the Act may obviate the need for impeachment proceedings and avoid constitutional confrontations. As noted earlier, Congress determined that if a President is placed in the untenable position of overseeing an investigation or prosecution of his own subordinates, the opportunities for the President to become tainted — at least with an appearance of a conflict of interest — are thereby increased. Congress, therefore, made the reasonable judgment that inter-branch conflicts, and, ultimately, the need to threaten or resort to impeachment, could be lessened through the Act.

In short, the court of appeals blatantly — and improperly — substituted its own public policy and legislative-type judgments for those made by Congress. After due deliberation, Congress reasonably concluded that the Independent Counsel Act serves "substantial public interests," *Nixon v. GSA*, 433 U.S. at 443, and those interests afford a more than adequate basis for sustaining the law.

CONCLUSION

The decision of the court of appeals should be reversed, and the Court should uphold the constitutionality of the Act.

Respectfully submitted,

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March 9, 1987

ADDENDUM

MEMORANDUM FOR JUDGE WILLIAM W. WILKINS, JR., CHAIRMAN, UNITED STATES SENTENCING COMMISSION

This memorandum responds to your request of December 1, 1986, for the Attorney General's opinion on the questions whether the United States Sentencing Commission has statutory authority to issue guidelines governing judicial imposition of capital punishment and whether such guidelines would be binding on the federal courts. The Attorney General has referred your request to this Office for response. See 28 C.F.R. 0.25.

At the outset, we must address the question whether this Office has authority to respond to the Commission's request. Because the Attorney General is empowered to render legal advice only to the various components of the executive branch of government, see 28 U.S.C. 511 (the President); 28 U.S.C 512 (the heads of executive departments); 28 U.S.C. 513 (Secretaries of military departments), this Office can provide an opinion to the Sentencing Commission only if the Commission is within the executive branch.

I. THE SENTENCING COMMISSION IS WITHIN THE EXECUTIVE BRANCH

The question of our jurisdiction arises because Congress has labeled the Sentencing Commission "an independent Commission in the judicial branch" of government. 28 U.S.C. 991(a). Notwithstanding the

label attached by Congress, however, we believe that the Sentencing Commission is an executive agency. The Supreme Court's recent decision in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), makes clear that the label that Congress attaches to a governmental entity does not govern the branch in which the entity resides; rather, the functions performed by the agency determine its character as an executive, legislative, or judicial agency. Thus, in *Bowsher*, the Court acknowledged that "Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch" and that several statutes explicitly identify the Comptroller General as "'a part of the legislative branch of Government.'" *Id.* at 3191. But, because the Balanced Budget and Emergency Deficit Control Act of 1985 assigned to the Comptroller General "an executive function," the Court held that he had to be treated under the Constitution as an executive officer for purposes of that statute. *Id.* at 3192. Accordingly, we turn to an examination of the functional character of the Sentencing Commission.

The Sentencing Commission is charged with establishing a range of appropriate penalties for violations of federal criminal statutes, based upon the factors and criteria that Congress has directed the Commission to consider. See 28 U.S.C. 994.[1] This task necessarily involves the Commission's interpretation and elaboration of the standards enunciated by Con-

[1] The statute requires the Commission to carry out legislative policy according to an "intelligible principle" laid down by Congress in a statute; it therefore appears to constitute a proper delegation of authority to the Commission. *J.W. Hampton and Company v. United States*, 276 U.S. 394 (1928).

gress. Furthermore, in establishing guidelines for use by sentencing courts, the Commission promulgates rules of decision, just as, for example, the Occupational Safety and Health Administration (as well as a host of similar administrative agencies) promulgates rules of decision when it sets out schedules of penalties for the substantive violations of the statute it administers.

The Sentencing Commission's functions plainly are not judicial in nature. Article III of the United States Constitution limits "the judicial Power" of the United States to the resolution of cases and controversies.[2] U.S. Const. Art. III, sec. 2, cl. 1. The judicial branch clearly includes the federal courts that exercise this power, as well as certain judicial adjuncts employed under the direct supervision of the courts. See *United States v. Raddatz*, 447 U.S. 667 (1980). By contrast, the Sentencing Commission does not resolve cases or controversies.[3] We conclude, therefore, that the Sentencing Commission may not be placed in the judicial branch.

[2] To be sure, in the criminal law context, the resolution of cases and controversies includes the imposition of sanctions prescribed by law. When a range of permissible sanctions is prescribed by statute, determining which sanction within the range shall be imposed on a particular defendant is a judicial function. Determining the range of permissible sanctions for a particular violation, however, is a lawmaking function, which can be performed only by Congress or by the executive branch pursuant to an appropriate delegation. See note 1, *supra*.

[3] The Commission is also unlike the various Judicial Councils, which deal with the management of their respective judicial circuits, see 28 U.S.C. 331. These bodies consist of judges dealing collectively with the necessary chore of administering the courts to which they belong.

Moreover, under the reasoning of *Bowsher*, it seems clear that the Sentencing Commission must reside in the executive branch. In *Bowsher*, the Supreme Court held that the Comptroller General's "exercise [of] independent judgment and evaluation with respect to . . . estimates" of "federal revenues and expenditures" for purposes of triggering deficit reduction requirements constitutes the "execution of the law in constitutional terms." 106 S. Ct. at 3192. In so concluding, the Court relied on the fact that the Comptroller General had to "interpret the provisions of the [relevant] Act to determine precisely what budgetary calculations are required" and that such decisions "are typically made by officers charged with executing a statute." *Id.* In this respect, the Court remarked that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Id.* Accordingly, the functions of the Commission – interpreting the policies, standards, and criteria laid out by Congress to implement the legislative mandate of providing narrower discretion in federal criminal sentencing – fall within Bowsher's construction of what constitutes an executive function. We therefore conclude that the Commission is an executive agency and that this Office has authority to render the requested legal advice.[4]

[4] Because 28 U.S.C. 991 provides that "[a]t least three of the members [of the Commission] shall be Federal judges" and 28 U.S.C. 992 permits "[a] Federal judge [to] serve as a member of the Commission without resigning his appointment as a Federal judge," the question arises whether service by an active federal judge as an officer in the executive branch is consistent with the constitutional principle of separation of powers. Although two Circuits have split on this question, compare *Matter of President's Commission on Organized Crime, Subpoena of Nicodemo Scarfo*, 783 F.2d 370, 380-81 (3d Cir. 1986) (upholding

the constitutionality of the service of an active judge as Chairman of the President's Commission on Organized Crime), with *In re Application of President's Commission on Organized Crime, Subpoena of Lorenzo Scaduto*, 763 F.2d 1191, 1196-98 (11th Cir. 1985) (finding that a judge's service on that commission would engender an impermissibly "pro-government perspective . . . ill-suited to [the judge's] obligation to be neutral in the courtroom"), this Office has consistently taken the position that the service of individual judges in executive agencies is constitutionally permissible. See *e.g.*, Memorandum for the Associate Attorney General, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, August 24, 1983, at 1-2 n. 2; see also Memorandum for Ramsey Clark, Assistant Attorney General, Lands Division, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, November 27, 1963, at 1 ("Whether the President should call upon Federal judges to engage in nonjudicial functions is basically a matter of policy."). Indeed, no other conclusion seems plausible given the text of the Constitution and the long history of extrajudicial service by active federal judges. Specifically, because the Incompatibility Clause expressly applies to members of Congress and omits any reference to members of the judiciary, that provision suggests, by negative implication, that there is no constitutional bar to the service of a judge in an executive branch position. See Art. II, sec. 6, cl. 2 ("[N]o Person holding any Office under the United States . . . shall be a member of either House during his Continuance in Office."). There is also ample historical precedent for the personal service of a judge in an executive capacity from the period immediately after the framing of the Constitution. For example, Chief Justice Jay served as special envoy to England and negotiated Jay's Treaty; Chief Justice Ellsworth served as Minister to France during part of his judicial tenure; and Chief Justice Marshall was Secretary of State and Chief Justice simultaneously for a month. This list is far from exhaustive, but illustrates an important point: these men, personally familiar with the intent of the framers, found no constitutional impediment to dual executive and judicial service. We find these historical examples to be persuasive confirmation of the conclusion suggested by a textual examination of the Constitution. Of course, that certain members of the Commission are also federal judges, in no way affects the President's supervisory authority over the Commission, including his removal authority.

MOTION FILED
MAR 9 1988

No. 87-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON,

Petitioner,

v.

THEODORE B. OLSON, *et alia,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF BURTON D. LINNE, JACK O. SLATER, AND JOHN C. IMLAY IV IN SUPPORT OF PETITIONER

and

BRIEF *AMICI CURIAE*

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Pursuant to Rule 36.1 of the Rules of this Court, Burton D. Linne, Jack O. Slater, and John C. Imlay IV respectfully move for leave to file the annexed brief *amici curiae* in support of petitioner. Petitioner and one of respondents have refused consent for the filing of this brief.

INTEREST OF THE *AMICI CURIAE*

Amici curiae Linne, Slater, and Imlay are quintessential examples of individuals whose fundamental lib-

erties Congress intended to protect through the Ethics in Government Act[1]. Unjustly convicted of mail fraud, conspiracy, and wilfull failure to file tax-returns through the machinations of at least two prosecutors from the Department of Justice and an IRS agent from the Department of the Treasury who successfully conspired to defraud Grand and Petit Juries and a District Court with perjurious testimony and other wrongdoing,[2] these *amici* repeatedly implored officials of the Department of Justice to investigate this miscarriage of justice, expose the malfactors, and ally with them to secure judicial relief. But their entreaties, ultimately reaching even the Solicitor General of the United States, fell upon the deaf ears of conscienceless placemen committed (through reasoning they refuse to elaborate) to cover up the corruption and criminality in their own offices even at the cost of imposing lengthy prison sentences on men they know are innocent victims of a cynical, calculated, and cold-blooded "frame up".

Impecunious, unknown to the public, without friends in the political branches of government, and remindful that the District Court that convicted them and the Court of Appeals that affirmed their convictions had evinced little less hostility to their proclamations of innocence and little more concern with the Gestapo-like manner in which they were "railroaded" than had the Solicitor General and his colleagues, Linne, Slater, and Imlay turned for succor to the Attorney General of the United States, filing a petition therewith under the Ethics in Government Act. This

[1] 28 U.S.C. §§ 49, 591-98.

[2] The facts are set out in the *amici*'s petition for a writ of certiorari, *Linne v. United States*, No. 87-585 (denied 12 January 1988)

petition was pending when the Court of Appeals declared the act unconstitutional on 22 January 1988. The interest of these *amici*, then, in seeing—and, hopefully, significantly assisting in—reversal of the Court of Appeals' erroneous decision is as obvious as it is compelling.

PURPOSE OF THE BRIEF *AMICI CURIAE*

In their brief, Linne, Slater, and Imlay present an analysis of Article II, Section 2 of the Constitution different from, but withal stronger than, that those supporting the validity of the Ethics in Government Act have advanced heretofore. These *amici* submit that their treatment of the issue *sub judice* here will provide this Court with a focus both narrow and sharp that penetrates the smoky rhetoric with which the Court of Appeals has obscured this case and emphasizes the fundamentals of constitutional interpretation that should inform this Court's decision.

WHEREFORE, Linne, Slater, and Imlay pray that this Court grant their motion, and permit the filing of the annexed brief *amici curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1479

ALEXIA MORRISON,

Petitioner,

v.

THEODORE B. OLSON, *et alia*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF *AMICI CURIAE* OF BURTON D. LINNE, JACK O. SLATER, AND JOHN C. IMLAY IV IN SUPPORT OF PETITIONER

Pursuant to a motion for leave to file under Rule 36.1 of the Rules of this Court, Burton D. Linne, Jack O. Slater, and John C. Imlay IV file this brief *amici curiae* in support of petitioner.

INTEREST OF THE *AMICI CURIAE*

The interest of Linne, Slater, and Imlay as *amici curiae* appears in their motion for leave to file this brief, *ante*.

ARGUMENT

I. The Court of Appeals' disdain for the congressional policy-judgment on which the Ethics in Government Act rests has blinded it to the act's necessity and propriety under Article I, Section 8, Clause 18.

The purpose of the Ethics in Government Act is to insulate prosecutorial decisions in the Executive Branch of government, not merely from "the influence of partisan politics",[1] but also and especially from the control of outright criminal cabals that—as the victimization of *amici* Linne, Slater, and Imlay documents—lurk within the Department of Justice, stealthily plotting to destroy innocent Americans with trumpted-up charges, secure in the knowledge that, if discovered, they will be shielded by a "good ol' boy" network of cronies, backscratchers, and bedfellows who have perverted government service into a secret society that enforces, *or violates*, the law as it alone sees fit. Although paying lip-service to the desirability of this goal, the Court of Appeals' opinion nevertheless rides a strong undercurrent of undisguised personal contempt for the congressional judgment that the mechanism embodied in the act is, in fact, necessary (even questioning its efficacy at all).[2] To be sure, the opinion tries to paint over this prejudice with the constitutional whitewash that, whatever the merits of Congress' motives, the strictures of the act offend the President's power to "take Care

[1] Court of Appeals' Slip Opinion ("Slip Op.") at 87.

[2] *E.g.*, *id.* at 60 ("we see no reason why . . ."), 61 ("it is by no means clear to us that . . ."), 61 ("[w]e had not previously thought that . . ."), 62 ("[n]or do we see * * * why . . ."), 63 ("[w]e do not see how . . .").

that the Laws be faithfully executed".[3] But there is too little pigment here to cover the crucial provisions of the Constitution the Court of Appeals struggles to mask.

A. The presidential power to "take Care that the Laws be faithfully executed" reflects the structural principle of separation of constitutional powers. Yet, raised to the position of pre-eminence the Court of Appeals desires, it would undermine, if not overthrow, the coordinate constitutional principle of checks and balances. Revealingly, the Court of Appeals forgets that execution of the law is at once a power *and a duty*, and that first among "the Laws" the President must "take Care * * * be faithfully executed" is the Constitution itself.[4] Moreover, the Constitution explicitly privileges Congress to share in the authority reposed in other branches of the government by empowering it

> [t]o make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[5]

Thus, the President's power to execute "the Laws" is itself conditioned by and contingent on the exercise of the supervening power of Congress to enact "*all* Laws" it, in its discretion, finds "adapted to the var-

[3] U.S. Const. art. II, § 3.

[4] U.S. Const. art. VI, cl. 2: "This Constitution * * * shall be the supreme Law of the Land * * *."

[5] U.S. Const. art. I, § 8, cl. 18.

ious *crises* of human affairs" that become the subjects of legislation.[6]

B. That corruption in the Executive Branch of the government, and particularly in the Department of Justice, has reached a state of crisis in the last few years no informed person doubts. Indeed, the experience of *amici* Linne, Slater, and Imlay demonstrates how individuals oblivious to duty and unmoved by appeals to decency have obtained critical posts in the Department. The ultimate cause of this degeneration being mankind's fallen nature, one can agree with the Court of Appeals that the danger the Ethics in Government Act addresses is "Inherent indeed!" in our system of government,[7] just as all human failings are. Yet to accept its inherence is not to despair of its eradicability—unless, with the Court of Appeals, one illogically concludes that the Constitution disables Congress from compelling execution of "the Laws" by those duty-bound, but too poltroon or miscreant, to do so.

Although Congress enacts all criminal law of the national government, its role in the enforcement of such law is circumscribed by the constitutional proscription of "Bill[s] of Attainder" and the constitutional limitation on the penalty for impeachment "extend[ing no] further than to removal from Office, and disqualification to hold any Office of honor, Trust or Profit under the Under States".[8] The power to execute the criminal laws resides in the President.[9]

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[6] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

[7] Slip Op. at 65.

[8] U.S. Const. art. I, § 9, cl. 3; art. I, § 3, cl. 7.

[9] U.S. Const. art. II, § 3.

This separation of function does not necessarily imply, however, that Congress lacks authority to enact all laws which "shall be necessary and proper" to compel employment of the presidential power to execute the laws.

Even if the President has "exclusive authority and absolute discretion to decide whether to prosecute a case",[10] he cannot have a further *quantum* of discretion dishonestly, corruptly, or for personal criminal purposes to refuse to exercise his legitimate prosecutorial discretion legitimately. For his constitutional duty to "execut[e]" "the Laws" requires that he do so "faithfully". The President, then, can hardly complain on rational constitutional grounds if Congress enacts a law "for carrying into execution" that duty, not by directing *how* he should exercise his prosecutorial discretion, but merely by guaranteeing that that discretion will be exercised "faithfully" in *some* manner.

Indeed, the supposedly "constitutional" dispute over infringements the Ethics in Government Act allegedly makes on the President's power to "execut[e]" "the Laws" verges on the operationally nonsensical. Through the Attorney General, *the President* decides, apparently in his "absolute discretion", whether grounds exist for appointment of an independent counsel.[11] The court has *no* power to appoint an independent counsel itself,[12] or to remove such counsel from office except when the counsel's investigation is

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[10] United States v. Nixon, 418 U.S. 683, 693 (1974).

[11] 28 U.S.C. § 592(b)(1), (c)(1). *See* Ponzi v. Fessenden, 258 U.S. 254, 262 (1922).

[12] 28 U.S.C. § 592(b)(1).

completed "or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions".[13] Also through the Attorney General, *the President* decides whether grounds exist for removal of an independent counsel.[14] To be sure, removal is limited and subject to judicial review.[15] But the overarching standard of removal is the finding of a "condition that substantially impairs the performance of such independent counsel's duties"[16]—hardly a ground for constitutional complaint by the President if the appointment of the independent counsel is in the first instance "necessary and proper".

True enough, the court and not the President selects the *person* of the independent counsel (although, as noted above, only the President can create the *office*).[17] But this process of selection is self-evidently

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[13] 28 U.S.C. § 596(b)(2). This action, however, returns the case to the President's complete control.

[14] 28 U.S.C. § 596(a)(1).

[15] 28 U.S.C. § 596(a)(3). The Court of Appeals' speculations on the scope of judicial review violate the rule of constitutional interpretation that a statute should be construed, whenever fairly possible, to *avoid* constitutional conflicts. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). There is no reason on the face of the statute—and the Court of Appeals provides none by way of principle or precedent—why the "report specifying the facts found and the ultimate grounds for • • • removal [of an independent counsel]" that section 596(a)(2) requires the Attorney General to submit is not the administrative record to which the reviewing court is confined and which it must scrutinize according to the traditional "arbitrary-and-capricious" standard. *Pace* Slip Op. at 54-55.

[16] 28 U.S.C. § 596(a)(1).

[17] 28 U.S.C. § 593(a), (c).

necessary to guarantee the independence of the individual chosen so as to serve the purpose of the statute. The Court of Appeals' lament that

> the President's capacity to enforce the law is largely dependent upon the identity and caliber of the officers who compose the Executive Branch, and if the President is without the power to appoint, he cannot define the character of his administration[18]

begs the question. For if the President himself, through the Attorney General, has determined that the circumstances demand appointment of an independent counsel, he has "define[d] the character of his administration" so as to warrant the judgment (in both his view and that of Congress) that remedial measures are necessary.

In sum, from the relevant constitutional perspective of Article I, Section 8, Clause 18, the Ethics in Government Act is unassailable.

II. In characterizing the independent counsel as a "principal Officer", the Court of Appeals patently misread Article II, Section 2.

Its ruminations on the expediency of the statute aside, the Court of Appeals' main criticism of the Ethics in Government Act is that the independent counsel, although a "principal Officer", is not nominated by the President and confirmed by the Senate.[19] A literal reading of the Constitution establishes, however, that the independent counsel is an "inferior Officer", whose appointment by the Attorney General

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[18] Slip Op. at 29.

[19] *Id.* at 10-23.

(as to the office) and the court (as to the person) is completely proper.

A. *Pace* the Court of Appeals, Article II, Section 2 is extraordinarily clear in its mandate. The *only* "Officers of the United States" who must be nominated by the President and confirmed by the Senate are those explicitly listed in clause 2 ("Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court") and the class of "other Officers" undefined in that clause. Who are those "other Officers"? First, the "principal Officers" mentioned elsewhere in the Constitution: to wit, "the principal Officer in each of the executive Departments", and "[t]he Judges of the * * * inferior Courts".[20] Second, whatever "Officers" "shall be established by Law" and whom Congress decrees shall be nominated by the President and confirmed by the Senate.

Not surprisingly, this list of "principal Officers" (to give them the name Article II, Section 2, Clause 1 uses) becomes in the "proviso" to Article II, Section 2, Clause 2 the list of "Officers" whom Congress may empower to appoint the "inferior Officers" of the United States.

From this it follows with fairly straightforward constitutional logic that:

1. There are two and only two classes of constitutional "Officers"—"principal Officers" and "inferior Officers".

2. The classification into which an "Officer" falls depends upon his office (in the cases of the President, Judges, and "Heads of Departments") or the mode

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[20] U.S. Const. art. II, § 2, cl. 1; art. III, § 1.

of his appointment (by the President and Senate; or by the President, "the Courts of Law", or the "Heads of Departments" alone, as Congress directs.)

3. "[I]nferior Officers" are not "inferior" perforce of subordination to some "superior", but solely because of the method of their appointment.[21] And,

4. Congress "may by Law vest the Appointment of * * * inferior Officers, *as they think proper*, in" *any* of the "principal Officers" who may exercise appointment-power.

The independent counsel is not one of the "principal Officers" named in Article II, Section 2, Clauses 1 or 2 or in Article III, Section 1. The procedure for appointing the independent counsel mandated by Congress does not provide for presidential nomination and senatorial confirmation. Rather, the independent counsel is appointed by a "Head of [a] Departmen[t]", the Attorney General, as to the office; and by a "Cour[t] of Law", as to the person. The independent counsel, therefore, is an "inferior Officer" of the United States, and can be nothing else, if the constitutional text is to be followed.

B. The bifurcated appointment-procedure the Ethics in Government Act establishes presents no constitutional problem.

First, the plain language of Article II, Section 2, Clause 2 gives Congress unreviewable discretion to

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[21] *See* U.S. Const. art. III, § 1. The "inferior Courts" are certainly not *subordinate*, in any necessary constitutional sense, to the "supreme Court"; for Congress may withhold all appellate supervision of the former from the latter. U.S. Const. art. III, § 2, cl. 2.

lodge the power to appoint "inferior Officers" "in the Courts of Law, or in the Heads of Departments". Here, Congress has lodged the primary power to appoint the office of independent counsel itself in the "Hea[d] of [a] Departmen[t]" (the Attorney General), and the ancillary and dependent power to appoint the person to occupy that office in a "Cour[t] of Law", so as to immunize the appointee from improper pressure or influence.

Second, nothing in Article III precludes conferral upon "the Courts of Law" of the limited appointment-power the act prescribes. Indeed, the interpretation of "[t]he judicial Power" Article III, Section 1 "vest[s]" in the courts most consistent with Article II, Section 2, Clause 2 is that "[t]he judicial Power" of the former section incorporates the appointment-power of the latter clause, by constitutional definition.

Third, such construction of Article II, Section 2, Clause 2 has already received this Court's sanction. In Ex Parte *Siebold*[22], this Court held Congress constitutionally authorized to empower courts to appoint supervisors of elections, whose duties were concededly nonjudicial, but allegedly "entirely executive in their character". Rejecting the contention that "no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department", the Court quoted Article II, Section 2, Clause 2, and then explained that

> [i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or ju-

[22] 100 U.S. 371 (1880).

> dicial, * * * to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution * * *.
>
> * * * [A]s the Constitution stands, the selection of the appointing power * * * is a matter resting in the discretion of Congress. * * * [T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety * * * have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.[23]

Siebold, of course, applies quite literally to the instant case: For it cannot be affirmed that the appointment of *the particular individual* to assume the office of independent counsel can "with any greater propriety" be "assigned to any other depositary of official power"—at least not if the congressional purpose is to be served. This case, moreover, is less extreme than *Siebold*, because here the Attorney General himself appoints the office of independent counsel (that is, determines that an independent counsel is necessary), turning over to the court merely the task of selecting the particular individual to fill that office.

[23] *Id.* at 397-98.

And that task is one hardly "incongru[ous]" for courts to perform, if past practices (never seriously challenged) are consulted.[24]

In short, on its face the Constitution sanctions the appointment-procedure of the Ethics in Government Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals, and declare the Ethics in Government Act constitutional.

Respectfully submitted,

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[24] *See* 28 U.S.C. § 546(d).

Supreme Court, U.S.
FILED
MAR 9, 1988

No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

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THEODORE B. OLSON,
EDWARD C. SCHMULTS, and
CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF COMMON CAUSE AS *AMICUS CURIAE* IN SUPPORT OF THE CONSTITUTIONALITY OF THE INDEPENDENT COUNSEL LAW

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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OCTOBER TERM, 1987

No. 87-1279

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON,
EDWARD C. SCHMULTS, and
CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF COMMON CAUSE AS *AMICUS CURIAE* IN SUPPORT OF THE CONSTITUTIONALITY OF THE INDEPENDENT COUNSEL LAW

INTEREST OF COMMON CAUSE

Common Cause, a citizens' organization of 290,000 members dedicated to integrity, openness, and accountability in government, has been an active advocate of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591 *et seq.*, Pub. L. No. 95-521, 92 Stat. 1824, since the original bill was introduced.[1] Common Cause has filed briefs *amicus curiae* in support of the Independent Counsel provisions of the Act not only in the lower court in this case,[2]

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[1] The law has been twice amended and reenacted. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039; Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-181, 101 Stat. 1293.

[2] *In re Sealed Case*, No. 87-5261 (D.C. Cir. Jan. 22, 1988) (slip op.).

but in other cases involving the constitutionality of the Act.

Common Cause submits this brief in support of Appellant and the constitutionality of the Independent Counsel provisions of the Ethics Act. The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

I. Article II

Four propositions demonstrate that the Ethics in Government Act of 1978 does not unconstitutionally attempt to vest in the Independent Counsel functions that must remain under Presidential control by virtue of Article II.

First, the Ethics Act confers upon the Independent Counsel only that degree of independence in the conduct of specific criminal investigations and prosecutions necessary to preserve public confidence in the integrity and impartiality with which the rule of law is applied to certain high government officials in whom the President or Attorney General have personal or partisan political interests which are likely to conflict with the even-handed administration of justice. An Independent Counsel is an officer whose role is limited to sharply defined bounds set by others, whose term is temporary, who is subject to the web of restraints imposed on all prosecutors by both the Justice Department and the courts, and who may be removed from office for avoidable violation of the Department's policies or other malfeasance or misconduct.

Second, even assuming that some executive functions are exclusively Presidential, the limited functions of the Independent Counsel are not so essentially Presidential as to fall in that category. A wealth of legal and constitutional history combine with contemporary practice to show that, although the federal practice has usually been to reserve ultimate control of prosecutions to the President and Attorney General, that control has never been regarded as a constitutionally exclusive prerogative of the

Chief Executive. Indeed, despite the federal practice, structural *separation* of prosecutorial functions from the Chief Executive has always been far more common than consolidation, in both Britain and the United States.

Third, neither the vesting of "executive power" in a President, U.S. Const. Art. II, § 1, cl. 1, nor the charge that the President "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, requires that the President control every function that might be described as executive. The Court has often sustained the constitutionality of laws giving another officer or agency the final responsibility for performing a discretionary function that might otherwise be performed by the President. This long-established principle carries the greatest force where, as here, the purpose of creating an independent office is to eliminate the risk of personal or political interference with impartial enforcement of the rule of law against high officials.

Fourth, where Congress and the President have power by law to create an office independent of Presidential control in order to ensure entire impartiality, they also have power by law to forbid the President from removing the officers without good cause.

II. Separation of Powers

The Ethics Act does not violate the separation of powers. The Act does not give Congress a role in the selection of the Independent Counsel or in the Counsel's conduct of an investigation or prosecution. The power given to the courts does not enlarge the constitutional functions of the courts. The power to appoint counsel and define his jurisdiction is granted by the express words of Article II, Section 2. *Ex Parte Siebold*, 100 U.S. 371 (1879). The judicial function under Article III has long embraced such powers over the conduct of prosecutors, and of judicial review of dismissals for just cause, as are authorized by the Ethics Act.

III. Appointments Clause

The limited nature of the Independent Counsel's responsibilities, as well as history and contemporary practice, combine to demonstrate that the Independent Counsel are "inferior officers" whose appointment Article II, § 2, cl. 2, expressly authorizes Congress "by law" to vest in the courts of law. Nothing in the text, history, context or policy of the Constitution supports the court of appeals' conclusion that "inferior" must carry the meaning "subordinate to a principal officer." *In re Sealed Case*, slip op. at 17. *Ex Parte Siebold* makes plain that the courts may be vested with power to appoint non-judicial officers when congruent with their duties under Article III. No incongruity is involved in the court appointment of a prosecutorial official.

ARGUMENT

I. THE ETHICS ACT DOES NOT UNCONSTITUTIONALLY ASSIGN TO INDEPENDENT COUNSEL FUNCTIONS WHICH ARE THE EXCLUSIVE RESPONSIBILITY OF THE PRESIDENT UNDER ARTICLE II.

A. The Functions Assigned to Independent Counsel Are Limited to The Conduct of A Specific Class of Cases in Which The President Is Likely to Have A Disqualifying Personal or Political Interest.

The Independent Counsel provisions of the Ethics Act are designed to implement two ideals fundamental to our constitutional system. One is the rule of law, which binds even the President and denies the President the power to set the law aside or to exempt any official from the usual, impartial steps in the administration of criminal justice. The second is the principle of equal justice under law, which precludes any official with a personal or partisan interest in the outcome from participating in the administration of criminal justice in a particular case. Observance of both these principles is essential to the preservation of that public trust in government without which a free society cannot survive.

Watergate demonstrated that disregard of these principles, particularly by self-interested Presidential intervention in a criminal investigation, precipitates a major crisis in the public's trust in government. Prior to the appointment of a Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division of the Department of Justice had served as a "conduit for a constant flow of information from the grand jury and the prosecutors" to both President Nixon and his counsel. S. Rep. No. 981, 93rd Cong., 2d Sess. 80 (1974). White House counsel was told the identity of witnesses who would be called before the grand jury and what questions they would be asked. *Id.* The Department of Justice made sure that the investigation was narrowed down. *Id.* Later, after extensive hearings, the House Judiciary Committee that reported the Ethics Act concluded:

> The Attorney General is at the same time the chief Federal law enforcement official and a Presidential appointment who is a key member of the President's cabinet. Cases involving possible wrongdoing by high-level executive branch officials, therefore, present a fundamental conflict of interest.
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> H.R. Rep. No. 1307, 95th Cong., 2d Sess. 2 (1978).

In 1982 and again in 1987, after nine years' experience during which time there was need to appoint Independent Counsel on ten occasions, Congress—both times with the concurrence of President Reagan—again reached the conclusion that legislation was needed to meet the grave danger of improper Executive interference with criminal investigations of high-ranking Executive officials. Not only actual conflict, but the appearance of conflict was deemed by Congress to be a compelling justification for the law.[3]

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[3] As phrased by the Senate Judiciary Committee:

> The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself. Having men of integrity operate in the face of a conflict is an insufficient protection for a system of justice.
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> S. Rep. 170, 95th Cong., 1st Sess. 6 (1977).

The independence of the investigation into charges of wrongdoing by a high executive official is also the best protection against unjust injury to the innocent. A prosecutor with personal or political ties to the individual charged may intentionally or unintentionally be unfairly aggressive because of awareness that he may be suspected of favoritism. His decision not to prosecute will do little to restore the official's reputation if the public has reason to suspect that the decision was influenced by personal favoritism. The present Attorney General has testified that the appointment of an Independent Counsel "was the only effective and fair way to determine the merits" of charges of wrongdoing against him while he was Counsellor to the President. *The Confirmation of Edwin Meese III to be Attorney General of the United States: Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 96 (1985).[4]

The provisions of the Act are carefully tailored to secure these goals. They apply only to criminal investigations against a very limited number of high officials, in the outcome of which the President or Attorney General will often have a disqualifying personal interest because of either close association or the probable effect of the disposition of the charges upon their own political fortunes.[5] Independent Counsel are to be appointed only if,

[4] Experience disproves the court of appeals' suggestion that the statutory freedom of Independent Counsel from Presidential oversight subjects high officials to risk of serious unfairness because an Independent Counsel will feel excessive pressure to produce indictments and convictions. *In re Sealed Case*, slip op. at 65-70. Six of the ten Independent Counsel have closed their investigations without an indictment. Three investigations are still pending. Only two indictments have been returned, one in a pending investigation. *New York Times*, January 23, 1988 at 8, col. 2.

[5] 28 U.S.C. § 591(b) limits coverage to charges of wrongdoing by the President, Vice President, high officials in the White House, Justice Department and CIA, and ranking officers of the President's national campaign committee. Additionally, under Section 591(c), the Attorney General may request an independent counsel if he

after a "preliminary investigation" by the Department of Justice, the Attorney General finds "reasonable ground to believe that further investigation or prosecution is warranted." 28 U.S.C. § 592.

In requiring the Attorney General to apply for the judicial appointment of an Independent Counsel in this narrow class of cases, Congress did no more than to invoke the ancient legal and equitable principle that a fiduciary should stand aside from any transaction in which he has personal or pecuniary interests, even though he sincerely believes that he can—and conceivably can—weigh the beneficiaries' interests without regard to his own. The Attorney General is a fiduciary charged with securing for the benefit of the public the disinterested investigation and prosecution of federal crimes. Personal and partisan interest in the outcome of a criminal investigation is no less disqualifying than a financial interest. Close official and political association is scarcely less disqualifying than the ties of family and friendship. Many honorable Attorneys General would recuse themselves from personal participation in a sizeable proportion of the cases covered by the Ethics Act. So would a President. The Act does little more than make this precept law for the special category of cases in which the disqualifying conflict is most likely to arise.

The powers of any Independent Counsel are confined within a carefully circumscribed area. Section 592(d)(1) requires the Attorney General to furnish the court sufficient information to define the "prosecutorial jurisdiction" of an Independent Counsel. Section 593(b) directs the court to define that jurisdiction. It is implicit that the jurisdiction of an Independent Counsel will be confined to investigating activities substantially related to the conduct constituting the violation or violations of

determines that an investigation by the Justice Department "may result in a personal, financial or political conflict of interest." 28 U.S.C. § 591(c).

law suggested in the information submitted by the Attorney General to the court.

The Act gives an Independent Counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers" with respect to the specific matters confined to him. 28 U.S.C. § 594(a). The Justice Department is forbidden to interfere within that jurisdiction. 28 U.S.C. § 597. This degree of independence is secured by a prohibition against removal without good cause. 28 U.S.C. § 596(a). Without these safeguards there could be no assurance that in a case involving one or more officials high in the Administration the conflicting personal or political interests of the President or Attorney General would not defeat or distort the cause of justice.

This danger has both obvious and subtle forms. Congress was well aware of the best illustration of the obvious form—the first Watergate Special Prosecutor was dismissed contrary to assurances of total independence and of security against his removal for anything other than "extraordinary improprieties." 28 C.F.R. § 0.37 (1973).

The need for safeguards against subtler, less dramatic interference is even greater. The attorney in charge of a case against a high executive official will often be required to decide such questions as whether to pursue or drop a particular line of investigation, whether to summon a particular witness before the Grand Jury, whether to subpoena certain documents or to respect claims of privilege, whether to grant immunity to a witness, or whether and when to seek and release an indictment against one of the possible defendants. Under many circumstances the decision of such a question may carry, or seem likely to carry, serious political or personal implications for the President or Attorney General. Direct and indirect pressure may be put upon the prosecutor. The closer the question, the greater the need for independence. The attorney in charge of the investigation

will find himself in a quandary if the President or Attorney General retains power to remove him and terminate his investigation. Is the particular witness, piece of evidence or line of investigation so important to the discharge of his responsibility as to justify risk of dismissal and termination of independent investigation? Or would the ultimate goal best be pursued by yielding in the particular instance?

Although he is guaranteed a measure of independence, an Independent Counsel has no power to make policy. He is bound by the policies established for the Department of Justice unless inconsistent with his statutory duty. 28 U.S.C. § 594(f). Any significant violation of an established departmental policy might well give "good cause" for the Attorney General to remove an Independent Counsel, as authorized by Section 596(a)(1).

The restraints imposed by the established policies of the Department of Justice are very real. The Department has promulgated extensive guidance in Title 28, Part 45 of the Code of Federal Regulations, and in the three massive volumes on criminal proceedings from the U.S. Attorneys Manual.[6]

In deciding whether to begin or to decline prosecution, the federal prosecutor is bound by the principles of federal prosecution, U.S.A.M. 9-27 (1984), which state in some detail the situations in which it is or is not proper to exercise the prosecutor's discretion in favor of prose-

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[6] Departmental regulations require an attorney to disqualify himself for any personal or political relationship that might undermine impartiality. 28 C.F.R. 45.735-4 (1987). Proceedings in the grand jury are the subject of very extensive policy recommendations dealing with everything from what advice must be given to recipients of subpoenas, to the disclosure of exculpatory evidence and the proper use of contempt. *E.g.*, U.S.A.M. 9-11.260, 9-11.334, 9-39.000 (1984). The U.S. Attorneys Manual provides direction and guidance in many cases as to when it is appropriate or inappropriate to use a particular statute. *E.g.*, U.S.A.M. 9-27.210-27.260 (1984); *see also* 28 C.F.R. 59.1(b) (1987), 28 C.F.R. 50.10 (1987), U.S.A.M. 9-11.270 (1984).

cution. As members of the bar, federal prosecutors are also required to conform to the professional canons and rules of the courts.[7] The prosecutor's conduct at trial is no less bound by court rules, department standards, and professional canons of behavior.

In sum, although an Independent Counsel is charged with the ultimate responsibility for decisions concerning a particular investigation and any resulting prosecutions, his decisions are made within an extensive framework of professional obligations and traditions, judicial oversight, and Department of Justice policies and rules. In his handling of cases, the prosecutor has duties to the law, to his profession, and to the courts.

B. Article II Does Not Bar Assigning To An Independent Counsel The Conduct of Particular Investigations And Prosecutions In A Limited Category of Cases In Which The President Is Likely To Have A Disqualifying Personal Or Political Interest.

The majority opinion below advances two overlapping reasons for rejecting the proposition stated above: first, the broad proposition that Article II incorporates the concept of a unitary executive under the President and therefore bars any law vesting any independent responsibility for any "executive" function in any other official, slip op. at 42; second, the narrower proposition that, in any event, control over all criminal investigations and prosecutions is a quintessential Presidential responsibility which may not be limited or denied in any part, even by a law enacted by Congress and signed by the President. *Id.* at 26, 51.

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[7] The ABA Model Code of Professional Responsibility stresses the prosecutor's responsibility to "seek justice, not merely to convict." Model Code of Professional Responsibility, E.C. 7-13 (1981). Disciplinary Rule 7-103 circumscribes the prosecutor's conduct by stipulating that a prosecutor may not initiate criminal charges when he knows the charges are not supported by probable cause, and by requiring a prosecutor to make timely disclosure to the defense of any evidence negating guilt or punishment. *Id.* at D.R. 7-103.

We deal with the narrower contention first. We also assume that, under Article II, there are some Presidential prerogatives of which he may not be deprived by legislation. Nevertheless, both history and precedent demonstrate that the conduct of particular criminal investigations and prosecutions is not an essential Presidential function. We then show that the sweeping concept of a unitary executive advanced by the court below is contrary to well-established practice and the decisions of this Court.

1. *History and Precedent Both Demonstrate That The Investigation and Prosecution of Such Cases Is Not An Essential Presidential Function.*

To prevail in this case the Independent Counsel need not show that no criminal investigations or prosecutions are the exclusive prerogative of the President. The Act applies, as we have shown, only in those situations in which the danger of conflict is the greatest. In truth, the partial structural separation created by the Ethics Act is far less than our legal and constitutional history and contemporary practice will support.

In describing a prosecutor as quintessentially an arm of the President, the majority below presented a view that contrasts strangely with legal history, American practice, and contemporary views of a prosecutor's duties. Moreover, although federal laws have usually vested a degree of control in the Executive Branch as a matter of practice, not of constitutional necessity, control over the conduct of specific cases has never been regarded as quintessentially executive and responsive to the head of state.

In early English history, prosecutions were not initiated by the Crown. Virtually all prosecutions were private, initiated by the victim of the crime.[8] A justice of

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[8] J. Baker, "Criminal Courts and Procedure at Common Law," in *Crime in England 1550-1800* 15-17 (J.S. Cockburn, ed. 1977); J.J. Tobias, *Crime and Police in England 1700-1900* 117-19 (1979);

the peace would then investigate the complaint, and if there was a *prima facie* case, he would issue a bill of indictment. If a grand jury then deemed the indictment a "true bill," the case went to trial. At trial, the victim generally acted as the "prosecutor," sometimes represented by counsel.[9]

In the century before the ratification of the Constitution, the English system of prosecution was still dominantly one carried on by private individuals. Indeed, concerned by the large number of crimes that went unprosecuted, Parliament enacted a series of measures to encourage private prosecutions.[10] By the late seventeenth century, private prosecuting societies developed to promote the "enforcement" of the laws."[11] Plainly these prosecutions were not subject to the King or the King's officers.[12] Neither the inquiries into possibly criminal activity nor the grand jury's indictments nor the conduct of the prosecution were subject to executive control.

Kurland, *Public Prosecutions in England, 1854-79: An Essay in English Legislative History*, 1959 Duke C.J. 493, 494-7.

[9] *See generally*, Baker, *supra* at 15-20; Tobias, *supra* at 128-31.

[10] *E.g.*, "An Act for Encouraging the Apprehension of Highwaymen," 4 W & M ch. 8 (1692); "An Act for Indemnifying Persons Who Have Been Guilty of Offenses Against the Laws Made for Securing the Revenues of Customs and Excise," 9 Geo. 2, ch. 35 (1736); "An Act for the Better Preventing Theft and Highway Robberies," 25 Geo. 2, ch. 36 (1752); *see generally* 2 Radzinowicz, *History of the English Criminal Law and Its Administration from 1750* 57-63, 68-72, 74-82 (1956).

[11] Tobias, *supra* at 126-28; Radzinowicz, *supra* at 2-5, 122-3. These societies, composed of private individuals, raised money to hire agents to police certain districts, detect offenders, gather evidence and sponsor prosecutions. Similarly, local self-protection associations were formed to fulfill many of the roles later played by public police forces. Tobias, *supra* at 126-8, Radzinowicz, *supra* at 202-9.

[12] Not until the creation of a public police force in the mid-nineteenth century did a public body become responsible for prosecutions. A Director of Public Prosecutions was created in 1879, but even so, this office fulfilled a largely advisory role, giving assistance to the still-prevalent private prosecutors. Tobias, *supra* at 125.

The separation of criminal investigations and prosecutions from the executive functions of the Governor was also familiar in the American colonies, soon-to-become states. In the colonial era most prosecutions were initiated by the aggrieved citizen.[13] Justices of the peace were also quasi-prosecutors. In the period immediately after the adoption of the Constitution, the grand jury itself conducted much of a criminal investigation, in conjunction with the summons power of the magistrate, independent of the behest or supervision of a public prosecutor.[14] Where there were public prosecutors, their appointment was not the preserve of the chief executive. Connecticut's courts, for example, began appointing the state's district attorneys in 1704 and continued to do so until 1984.[15]

Today, in at least forty-four states where, as under the U.S. Constitution, government is based on the separation of powers, prosecutors are not subject to the Chief Executive. In forty-two states, the attorney general is elected. In Maine, the attorney general is appointed by the state legislature, and in Tennessee by the state su-

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[13] J. Smith, *Colonial Justice in Western Massachusetts* 129-30 (1961); J. Goebel and T. Naughton, *Law Enforcement in Colonial New York* 339-48, 370 (1970); Spindel, *The Administration of Criminal Justice in North Carolina, 1720-1740*, 25 Am.J. Legal Hist. 141, 146 (1981); Nelson, "Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective," 42 N.Y.U.L. Rev. 450, 467-68 (1967); E. Page, *Judicial Beginnings in New Hampshire, 1640-1700* 107 (1959).

[14] M. Tachau, *Federal Courts in the Early Republic* 96 (1978). J. Goebel and T. Naughton, *supra* at 337, 350-51, 355-59; S. Walker, *Popular Justice* 111-12 (1980); Edwards, The Grand Jury, 21 Col.L.Rev. 376-78 (1921); 2 Z. Swift, *Digest of the Laws of the State of Connecticut*, 369 (1823 ed.).

[15] 4 Conn. Col. Rec. 468 (C. Hoadley, ed. 1868); Conn. Stat. 1808, p. 67 § 6; Conn. Stat. 1821, p. 141, § 22; Conn. Gen. Stat. § 51-278 (1983); Swift, *supra* at 369.

preme court.[16] The practice of electing local prosecutors is widespread.[17] Court appointment of special prosecutors is a common practice in the states.[18]

Given this background, it would be surprising to find that the Framers of the Constitution regarded control over all criminal prosecutions as an exclusive and indispensable function of the President. And indeed, the evidence of their views points the other way. Section 32 of the first Senate draft for the Judiciary Act of 1789 provided that each *district court* should appoint "a meet person learned in the law, to act as Attorney of the United States in such district," and that the Supreme Court should appoint "a meet person learned in the law to act as Attorney General for the United States . . . ." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 108-09 (1923). Five of the ten draftsmen of that provision, including Oliver Ellsworth, had attended the Philadelphia Convention.

Although the bill was revised to provide for Presidential appointment with the advice and consent of the

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[16] *See* National Association of Attorneys General: Committee on the Office of Attorney General, *Powers, Duties and Operations of State Attorneys General* 77-78 (1977).

[17] *See* Cal. [Gov't.] Code § 24009 (West 1968); Mo. Rev. Stat. § 56.010 (1986); Nev. Rev. Stat. Ann. § 252.020 (Michie 1986); N.C. Gen. Stat. § 7A-60 (1986); Okla. Stat. Ann. tit. 19, § 215.20 (West 1962 & Supp. 1988). The Colorado constitution provides for the election of local prosecutors. *See* Colo. Const. Art. VI, § 13.

[18] *See* Ala. Code § 12-17-185 (1975); Fla. Stat. Ann. § 27.16 (West 1974); Ga. Code Ann. § 15-18-5 (1985); Ill. Ann. Stat. ch. 14, para. 6 (Smith-Hurd 1987 Supp.); Nev. Rev. Stat. Ann. § 252.100 (Michie 1986). *See also Weems v. Anderson*, 516 S.W.2d 895 (Ark. 1974); *In re Shelley*, 2 A.2d 809 (Pa. 1938); *State v. Hayes*, 18 A.2d 895 (Conn. 1941); *Taylor v. State*, 38 So. 380 (Fla. 1905); *Territory v. Harding*, 12 P. 750 (Mont. 1887); *People ex rel. Lindsley v. District Court*, 66 P. 896 (Colo. 1901); *State v. Ganthier*, 231 P. 141 (Ore. 1924).

Senate,[19] the 19th century history of the Department of Justice argues against, rather than for, the proposition that control of criminal prosecutions was perceived to be an exclusively Presidential function. The early U.S. Attorneys were private lawyers who worked on the basis of fees for services rendered.[20] Their tie to the judiciary is reflected in the appropriation bills linking the fees and costs of the U.S. Attorneys, not with the executive, but with the courts.[21] U.S. judges filled vacancies in the office without requiring statutory authority. *See* 6 Op. Att'y Gen. 80 (1853). Indeed, Congress continued until the early 19th century the British practice of relying upon private informers to bring law violations to the attention of the courts.[22]

In 1870, U.S. Attorneys were brought under the Attorney General and Department of Justice.[23] The general conduct of law enforcement came under increasing executive control on behalf of the President. But these developments have never operated to make prosecution an absolute or unchangeable prerogative of the President and Department of Justice. A federal court may designate an attorney to prosecute a criminal contempt. *Young v. United States ex rel. Vuitton et Fils*, 107 S.Ct. 2124 (1987). In 1924 Congress did not hesitate to give the special counsel appointed to investigate the Teapot

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[19] There is no hint in the records, letters and diaries of the time to suggest that this revision was made for constitutional rather than policy reasons.

[20] White, *The Federalists: A Study in Administrative History* 406-08 (1948). *American State Papers*, Miscellaneous, I. 303 (1802).

[21] *See* "An Act to Establish the Judiciary Courts of the United States" *reprinted in* 5 C. Bickford & H. Vert. *Documentary History of the First Federal Congress: Legislative Histories* 1150, 1165 (1986).

[22] 1 Stat. 29, Sec. 29 (1789); 1 Stat. 65, Sec. 8 (1789); 1 Stat. 101, Sec. 3 (1790); 1 Stat. 452, Sec. 3 (1796); *see generally* L. White, *supra* at 415-17.

[23] *See* Seymour, *United States Attorneys* 22 (1975).

Dome scandal "charge and control of the prosecution of such litigation, anything in the statutes touching the powers of the Attorney General of the Department of Justice to the contrary notwithstanding." Act of February 8, 1924, 43 Stat. 5 (1924). Criminal prosecutions were specifically included.

The argument of the court below for exclusive Presidential control of prosecutors draws scant support from the citation of hypothetical instances in which a prosecutor's pursuit of particular evidence or lines of inquiry might, if pressed too far, run counter to the views of the public interest held by other conscientious officials. *In re Sealed Case*, slip op. at 71. Independent Counsel can be expected to listen attentively to the representations of other officials concerning the effect of his intended actions upon other governmental concerns. Negotiation will nearly always resolve any differences. Should negotiation fail, the Independent Counsel has no coercive power of his own. The very most he can do is to invoke the coercive power of a court. The views of other government officials will be heard and weighed in the ensuing proceeding. The Ethics Act gives the Attorney General a right to appear as *amicus curiae*. 28 U.S.C. § 597(b). The process would provide no little assurance that excessively single-minded pursuit of prosecutorial concerns will not damage relations with another country or other national interests. As for the rest, Congress could properly decide that the damage likely to be done by independent prosecution was less than the damage done to the public interest by leaving the prosecution of cases in which the President and Attorney General have an actual or apparent conflict of interest nonetheless subject to their control.

There is nothing contrary to the teachings of history in the opinions quoted by the court below, slip op. at 26-51, to the effect that the "power to decide whether to investigate, and when to prosecute, lies at the core of the Executive's duties to see to the faithful execution of

the laws." Those opinions, with one exception, were describing not an arrangement ordained by the Constitution but the authority of the Executive Branch under the then existing statutes and practices.[24] The single exception, Justice White's opinion in *Buckley v. Valeo*, 424 U.S. 1, 285 (1976), speaks only of a congressional effort to usurp the functions of law enforcement, and obviously has no bearing upon giving independence to a prosecutor who may well be described as belonging to the Executive Branch.

On the other hand, *United States v. Nixon*, 418 U.S. 683 (1974), confirms the teachings of history, State practice, and professional discipline. The regulation of the Department of Justice giving the Watergate Special Prosecutor "plenary authority to control the course of investigation and litigation related to" the Watergate matter would not have been law binding on the Court if it had given away an authority that Article II requires to be vested in the President. And if the power to make independent prosecutorial judgments can be vested in a special prosecutor by departmental regulation approved by the President, surely the same authority can be vested in such an officer by a law enacted by Congress and approved by the President.

Nor can *Nixon* be distinguished upon the ground that there the President retained legal power to rescind the regulation. President Nixon had given the most solemn public assurances that he would not revoke the regulation. It passes the limits of imagination to suppose that the Framers would have believed that the legal power of a President to revoke a regulation in violation of a solemn public promise is so important that they would be willing to allow the President to delegate independent

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[24] *United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (*en banc*), *cert. denied*, 381 U.S. 935 (1965). *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986). *See also Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868).

prosecutorial responsibility to another officer based on such a solemn commitment, but would nevertheless be unwilling to allow such independent responsibility to be so vested by a law made by the President and Congress, or enacted over the President's veto by a two-thirds majority in each House. In reality, though, the power to dismiss an Independent Counsel for "good cause" gives a President greater control under the Ethics Act than President Nixon retained in the Watergate affair.

2. *Article II Does Not Bar Legislation Vesting In An Inferior Officer Independent Responsibility for Functions Not Required to Be Performed by the President.*

Once it is recognized that control over specific criminal prosecutions is not quintessentially a Presidential function, the Article II attacks on the Ethics Act quickly dissipate. The court of appeals assumes that because the Constitution establishes three branches of government—characterized as legislative, executive, and judicial—the Constitution requires this Court by the definitions it gives to those terms to draw sharp lines assigning each and every governmental activity exclusively to one or another branch. This proposition has repeatedly been rejected by this Court.[25] To turn the separation of powers among the three branches into a rule requiring Presidential control over every decision that may be denominated "executive" stands upon its head a principle adopted to ensure the diffusion of power.

The principle that Congress and the President may by law vest in a designated officer the responsibility for performing specific executive functions, and also make that officer's decision final and binding upon others, was established in the early days of the Republic. In *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), the Court issued a writ of mandamus to require

[25] *See Nixon v. Administrator of General Services*, 433 U.S. 425, 441-446 (1977), and authorities there cited; *c.f. The Federalist* No. 47 at 325-26 (J. Madison) (J. Cooke ed. 1961).

the Postmaster to comply with a law directing him how to settle a disputed account, typically an executive function. To arguments drawn from Article II and the separation of powers the Court replied:

> The theory of the constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed.
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> *Id.* at 610.

The Court continued:

> The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. *But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President.*
>
> *Id.* (Emphasis added.)

The Court next recognized that there are many "political duties" imposed on officers in the Executive Branch that are normally discharged under direction of the President, and then went on to rule:

> But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.
>
> *Id.*[26]

[26] This sentence follows immediately after the truncated and therefore misleading excerpt quoted in note 21 to the majority opinion in the court of appeals. Slip op. at 26.

Since 1887 the increase in social and economic legislation has multiplied exponentially the number of instances in which the laws vest in designated officers the power of final decision without interference by the Chief Executive on a matter that might have been left to his discretion. The constitutionality of such legislation is beyond question. *See e.g., Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The President's duty to "take Care that the Laws be faithfully executed" is performed by taking care that the officer faithfully performs the statutory duty. *See* 1 Op. Att'y Gen. 624, 626 (1823), 11 Op. Att'y Gen. 14, 16 (1864). The Ethics Act does not interfere with the President's performance of this constitutional duty because Section 596(a)(1) gives the Attorney General power to remove an Independent Counsel "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

3. *The Statutory Limitation Upon The President's Power of Removal Without Good Cause Does Not Infringe Upon An Exclusive Presidential Prerogative.*

Just as the century-old practice of establishing independent agencies to perform functions that might be delegated to the President illustrates that the Constitution does not require Presidential control of every non-legislative and non-judicial function, so too the decisions of this Court show that the power of the President to remove an officer at his pleasure may constitutionally be limited by law in a situation like that here, where Congress has constitutionally created an office whose duties are to be performed independent of Presidential control. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). *See also Weiner v. United States*, 357 U.S. 349 (1958).[27]

---

[27] To distinguish *Humphrey's Executor*, as the court below does, upon the ground that the Court spoke of the functions of independent agencies as "quasi-legislative" and "quasi-judicial" is to attribute a magical power to those words. In reality, responsibilities performed by the Interstate Commerce Commission, for example, in fixing railroad rates, are not significantly different from the functions performed by, for example, the Secretary of Agriculture in fixing milk prices, *see, e.g., United States v. Rock Royal Cooperative*, 307 U.S. 533 (1938), or the Secretary of Labor in fixing wages under the Walsh-Healy, 41 U.S.C. §§ 35-45, and Davis-Bacon Acts, 40 U.S.C. § 276a *et seq.*

II. INVESTING INDEPENDENT POWER TO PROSECUTE SPECIFIC CRIMINAL CHARGES AGAINST HIGH GOVERNMENT OFFICIALS IN AN INFERIOR OFFICER DOES NOT VIOLATE THE SEPARATION OF POWERS.

The constitutional purpose of the separation of powers is to prevent "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Bowsher v. Synar*, 106 S.Ct. 3181, 3189 (1986). Unlike the legislation held unconstitutional in those cases and in *Myers v. United States*, 272 U.S. 52 (1926), the Ethics Act transfers no power whatever from the Executive Branch to Congress, to any branch of Congress, or to any officer subject to any form of congressional control. Congress is given no voice in the appointment or removal of an Independent Counsel and no control over a Counsel's performance of the duties of the office.

In order to find an aggrandizement of congressional power, the court below was driven to engage in fanciful speculation, such as that the ability of members of the House and Senate Judiciary Committees to request the Attorney General to appoint an Independent Counsel "may, like a flicking left jab, confound the Executive Branch in dealing with Congress." Slip op. at 67.[28] The observation is as irrelevant as it is speculative. There is no enlargement of the power of Congress or of the members of any committee. Specific and credible information

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[28] Section 595(c) provides for such requests and requires the Attorney General, if he does not request the appointment, to explain his reason for failing to do so within thirty days.

suggesting criminal activities of high Presidential aides might equally affect the relative political influence of the President and Congress even in the absence of the Ethics Act. As for the political effect of the Independent Counsel mechanism—even if that were relevant—the availability of machinery for resolving charges free from suspicion of personally or politically motivated Presidential interference will typically strengthen a President's political position, unless he has political need to hide what has occurred.

Nor does the Ethics Act unconstitutionally aggrandize the Judicial Branch at the expense of the Executive. Article II, Section 2 specifically authorizes the courts of law to appoint inferior officers pursuant to Acts of Congress. An Independent Counsel is such an officer. *See* Point IIIA, *infra*. Defining the subject matter jurisdiction of each Independent Counsel in terms of the concrete charges or cases assigned is a necessary incident of an appointment *ad hoc*. The power that Section 596(b)(2) confers upon the court to terminate an office of Independent Counsel obviously contemplates none of the day-to-day judicial supervision of the conduct of an investigation conjured up by the court below. Slip op. at 82-83.[29] Similarly, Section 596(a)(3), which provides for judicial review of any removal of an Independent Counsel, has none of the implications supposed by the majority below. Whatever room there may have been for misunderstanding earlier versions of the Ethics Act, the recent amendments to the Act make plain that the scope of review here is to be no greater than the wholly familiar judicial review of discharges of other employees and officials for "good cause." H. Conf. Rep. No. 452, 100th Cong., 1st Sess. 14, 37 (1987).

[29] The court's power should be read as a largely formal mechanism for tidying up two situations: (a) cases in which there is no controversy over whether an Independent Counsel has completed the assignment, but Counsel has failed to file a report; and (b) cases in which an Independent Counsel has ceased to pursue the investigation.

There is no greater force in the suggestion that even though the Act does not enlarge congressional power, it diminishes the power of the President to such a degree as to offend the basic constitutional purpose of preserving a balance among the three Branches. *See Commodities Futures Trading Comm. v. Schor*, 106 S.Ct. 3245, 3260-61 (1986). As Justice O'Connor made plain there, the question in such cases is one of degree. As we have already shown, in appropriate cases Congress may by law charge inferior officers with independent responsibility for performing specified functions that may be described as executive, and may also protect that independence by limiting the President's discretionary power of removal. And as we have also shown, control over the conduct of the very narrow range of criminal investigations and prosecutions covered by the Ethics Act is not a core executive function.

Viewed in the total context of executive powers and duties, therefore, cases under the Ethics Act are trifling in number, involve no core Presidential responsibilities, and require no resolution of large questions of policy. Because high officials and public confidence in the integrity of government are involved, the cases have great dramatic interest and grave national importance. But the interest and national importance arise out of the very circumstances that require the mechanism provided by the Ethics Act. The officials covered by the Act are close to the President, so close that he is likely to be personally affected by the outcome, so close that there is an actual or apparent conflict of interest raising public suspicion of selfish personal or political interference by the President or Attorney General. The Independent Counsel mechanism takes no important power from a President short of the ability to abuse power, and, in the long run, the mechanism is the best—if not the only—way to preserve the public confidence in the integrity of a President upon which his proper power and the power of his successors depends.

III. INDEPENDENT COUNSEL ARE "INFERIOR OFFICERS" WHOSE APPOINTMENT ARTICLE II AUTHORIZES CONGRESS "BY LAW" TO VEST IN A COURT OF LAW.

Article II, Section 2, clause 2 of the Constitution provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The court below held that Congress lacked power by law to vest the appointment of Independent Counsel in a court, first, because Independent Counsel cannot be "inferior officers," and second, because in any event the Constitution bars the appointment by a court. We submit that both rulings are wrong.

A. Independent Counsel Are "Inferior Officers."

The present case requires no decision of the much-debated question whether the power to vest the appointment of "inferior Officers" in the President alone, in the Courts of Law, or in the Heads of Departments extends to all offices other than those particularly named in the Constitution. Even if "inferior Officers" is interpreted more narrowly, the Appointments Clause permits the President and Congress, or Congress alone upon overriding a veto, to provide "by law" for the appointment of officers with the narrow jurisdiction, relatively brief tenure, and important but limited independence of an Independent Counsel.

In the 18th century, as today, the adjective "inferior" was commonly used to mean "low or lower in station, rank, degree, or grade" and "of little or less importance, value, or excellence," without the slightest implication of being subjected to some other specific person's commands.[30]

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[30] *E.g.*, Thomas Sheridan, *A General Dictionary of the English Language, Vol. I* (1780); *Johnson's and Walker's English Dictionaries Combined* (1823); Noah Webster, *An American Dictionary of the English Language* (1830).

A dictionary published in Philadelphia in 1785 defines "inferior" as "lower in place; lower in station or rank of life; lower in value or excellence," and only last as "subordinate."[31] We commonly apply the adjective in this sense to kinds of work, positions, and even people, as well as products and ideas. Whether an office is "inferior" accordingly depends upon its relative rank or importance among all offices of the United States, including the scope of its duties, its duration, the degree of policymaking, and the relative amounts of independent discretion and supervisory control.

Judged by these criteria the Independent Counsel are plainly "inferior Officers." In rank and general importance they fall well below the officers named in the Constitution and a wealth of sub-Cabinet and independent agency positions. The jurisdiction of each Independent Counsel is limited to the investigation and, if appropriate, prosecution of the alleged criminal conduct of a single person, or growing out of a single set of related activities. The complete picture is of an officer whose role is limited to sharply defined bounds set by others, whose tenure is temporary, who is subject to the web of restraints imposed on prosecutors by both the Justice Department and the court, and who may be removed from office for violation of the Department's policies or other malfeasance or misconduct. Nothing in the words of the Constitution, the records of the Philadelphia Convention or the subsequent interpretation requires the conclusion that the appointment of such an officer must, despite legislation to the contrary, be made upon the advice and consent of the Senate.[32]

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[31] S. Johnson, *A Dictionary of the English Language in Which the Words Are Deduced From Their Originals* (1785).

[32] In limiting the words "inferior Officers" to those officials who are always subject in all important respects to some superior's direction and control, the court below was greatly influenced by imaginary examples of abusive legislation, enacted by two-thirds majorities over the President's veto, stripping the President of all normal executive functions. Slip op. at 39-41. Since *Gibbons v.*

The scant evidence of contemporary understanding confirms our interpretation. Discussion at the Constitutional Convention focused on the question whether the Executive, the Legislature or the courts should make appointments. The only relevant colloquy shows that the exact wording of the second part of the Appointments Clause was considered a matter of slight importance.[33] The most plausible explanation is that the delegates were willing to allow Congress and the President, or Congress by two-thirds majorities, the wide power to decide by law which offices created by law might appropriately be filled by appointments made without the advice and consent of the Senate.[34]

Ogden, 22 U.S. (9 Wheat) 1, 187-89 (1824), the Court has repeatedly ruled that the ability to hypothesize abuses of a power delegated to Congress is not sufficient reason for a narrow interpretation. In this instance there are also constitutional checks. Legislation of the extreme character imagined by the majority below would be subject to constitutional attack under other sections of Article II in accordance with the suggestion in *Commodity Futures Trading Comm. v. Schor*, 106 S.Ct. 3245, 3252 (1986). No such problem is presented by the Ethics Act.

[33] 2 *The Records of the Federal Convention of 1787* 627 (M. Farrand ed. 1966).

[34] This was the conclusion reached by Justice Story, who lived at a time much closer to the Framers than today:

> The propriety of this discretionary power in congress, to some extent, cannot well be questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to congress to act according to the lights of experience.
>
> 3 Story, *Commentaries on the Constitution of the United States*, §§ 1529, 1530 *reprinted in* 4 *The Founders' Constitution* 117, 119 (P. Kurland and R. Lerner, eds. 1987).

As noted above, the original draft of the Judiciary Act of 1789 also supports this understanding, in that it is evidence a number of the Framers believed that the Appointments Clause gives Congress and the President discretion to vest "by law" the appointment of both the Attorney General and United States Attorneys in the courts.

In enacting and reenacting the Ethics Act, three Congresses and two Presidents have concluded that an Independent Counsel is an Inferior Officer for whose appointment the advice and consent of the Senate is constitutionally required. This Court, in accordance with settled rules of constitutional interpretation, should give great weight to those judgments by the other two branches in exercising the power delegated to them by the Appointments Clause. That the Court has the final responsibility for interpreting the Constitution is beyond dispute. When the question turns solely upon the text, there may be scant room for deference beyond weighing with respect the opinion of others. But the settled rule is opposite, when as here, the case is within the outer textual limits of the delegation of legislative power to Congress, and the final judgment must turn upon finding and appraising the significance of facts, upon the balancing of several factors, and upon like questions of value and degree. In the latter cases, the rule since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) has been that the Court will not upset a rational congressional judgment. *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); L. Tribe, *American Constitutional Law* 303 (2d ed. 1987).

The present case falls in the latter class. In deciding whether an Independent Counsel is an inferior officer, it was for Congress to appraise the amount and overall significance of the independence it conferred in the context of such limiting factors as the specificity of the assignment, the brevity of each appointment, the absence of policy-making power, the obligation to conform to established policies of the Department of Justice, and the relative place of the office in the over-all plan of government. This Court could properly overturn the considered legislative judgment only if the constitutional text contained an absolute mandate requiring any officer in whom any significant degree of independence is vested to be appointed by the President with the advice and consent of the Senate regardless of any other circumstance. So rigid a rule would unduly constrict the organization of execu-

tive and administrative functions. It might well overburden the Senate. And, as applied to the narrow but important problem addressed in the Ethics Act, it would erode confidence in the rule of law by making it constitutionally impossible to provide assurance that the investigation and prosecution of crimes by high officials were conducted, as in the case of other citizens, by prosecutors serving only the ideal of impartial justice free from the dictates or pressures of political or personal self-interest.[35]

B. Appointment of Independent Counsel by a Court of Law is Authorized by Article II and Congruent with the Judicial Function under Article III.

The words of the Appointments Clause, given their plain meaning, expressly authorize Congress to vest the appointment of any inferior officer in the President alone, in the courts of law, or in the heads of departments, "as they think proper." There is no express limitation. *Ex-Parte Siebold* squarely upholds the constitutionality of legislation vesting in the circuit courts the duty of appointing supervisors of election whose duties were alleged to be "entirely executive in character" and "not connected with the judicial department." 100 U.S. at 397-99. The Court did not question this description. The decision plainly holds that unless barred by some other constitutional provision, Congress has discretion under the Appointments Clause to choose to vest the appointment of an inferior officer in a court of law regardless of whether the duties of the office might be characterized as executive, or judicial, or connected to the legislative branch.

[35] Under the narrow construction of "inferior Officers" adopted by the court below, the appointments of Special Watergate Prosecutors were unconstitutional because made without the advice and consent of the Senate. *United States v. Nixon*, 419 U.S. 683 (1974) implicitly upholds the constitutionality of those appointments. The distinction offered in the majority opinion below, slip op. at 18 n.17, has the absurd consequence of attributing constitutional significance to a President's retention of technical legal power to revoke a departmental regulation in violation of his explicit promises not only to the person appointed, but to the American people.

In support of his novel ruling that the Appointments Clause bars legislation vesting in one branch the power to appoint an individual to a position belonging to another branch, Judge Silberman quoted only the following sentence:

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties appertain.
>
> *Id.* at 397.

Judge Silberman omitted the next sentence and the remainder of the key passage from the *Siebold* opinion:

> But there is no absolute requirement to this effect in the Constitution. . . . [A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. . . . [T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depository of official power capable of exercising it.
>
> *Id.* at 397-98.

In speaking of "incongruity" the Court evidently referred to its earlier decisions holding that Congress may not call upon Article III courts to perform duties outside their constitutional functions. The Court then held that there was no such incongruity in the case before it because the duty to appoint inferior officers when directed by law is imposed by the Constitution. The present case is even clearer because appointing prosecutors has long been a familiar judicial function. *See* p. 14, *supra*.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,
v.
THEODORE B. OLSON,
EDWARD C. SCHMULTS, and
CAROL E. DINKINS,
Appellees.

On Appeal From the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 90 national and international unions with a total membership of over 14,000,000 working men and women. The AFL-CIO, its affiliates and the members of its affiliates all have a strong interest in the continuing validity of enactments that are designed to insulate executive officers entrusted with

the responsibility of administering a particular statutory mandate from immediate political pressures and in that way to further the disinterested enforcement of the laws. We file this brief because a portion of the opinion below in this case calls into question the constitutionality of long-established institutional arrangements of this kind.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the most part the constitutional challenges in this case to the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-598 ("the Act") are directed at the locus of decision-making under the Act: *viz.*, to whether the Act's conferral upon the Judiciary of the power to make certain governmental decisions is consistent with the constitutional provisions defining the tripartite structure of the federal government. Thus, for example, this Court is being asked to decide whether the Act's conferral upon an Article III court of the power to appoint an independent counsel (a) deprives the Executive Branch of its constitutional prerogative to make such appointments, and/or (b) allocates to the Judicial Branch a power the Judiciary may not assume consistent with its constitutional role. Similar questions are presented with respect to the Act's allocation to the Judicial Branch of a role in defining and supervising the task of the independent counsel and in the removal process.

It is *not* the purpose of this brief to address these questions all of which grow out of the unique institutional arrangements established by the Act. Rather, we focus on a question of a distinct nature that has found its way into this case, and that has sweeping significance for a wide variety of federal government agencies and offices that have been established by Congress to effectuate federal enactments: whether Congress may by statute impose a "good cause" limitation on the President's ability to remove a federal officer whose function is limited to implementing a particular statutory mandate.

The Act provides that an independent counsel "may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1). The court below found that, wholly apart from the role the Act gives the Judiciary in the appointment and removal processes, this "good cause" limitation is an unconstitutional restriction on the presidential power. Pet. App. 43a-53a.[1] In the view of the court below, Article II of the Constitution confers upon the President the power to remove at will any "'pure' executive officer." The court found the independent counsel to be a "'pure' executive officer" (Pet. App. 50a), and concluded, accordingly, that Congress may not by statute adopt standards that limit the circumstances in which the President may remove that officer. Pet App. 43a-53a. It is this ruling that we address in this brief.

In contrast to *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Myers v. United States*, 272 U.S. 52 (1926), this issue, we emphasize at the outset, does *not* involve the claim that one branch of the federal government is engaged in the direct performance of functions assigned by the Constitution to another branch. *Bowsher* and *Myers*, for example, involved assertions by Congress of the right directly to participate in the removal process of executive branch officers. *See Bowsher*, 106 S. Ct. 3081, 3187-3188 & n.4. Here, by contrast, the issue is simply whether Congress,

[1] The court of appeals correctly saw no constitutional infirmity in the statute's vesting of removal authority in the Attorney General alone, rather than directly in the President. Since the Attorney General is the head of an Executive Branch Department, responsible directly to the President, the President can be said to be acting through the Attorney General. Pet. App. 18a, n.17. See *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922).

acting wholly within its legislative sphere, may, for legitimate public purposes, enact standards for the removal of executive officers that govern the President in effecting a removal.

It is plain that Congress acts well within its Article I powers when, in passing a statute, the Legislature creates executive offices to administer the enactment and defines the qualifications for those offices and the conditions for removal from those offices. The controversy here thus comes down to whether this undoubted congressional power is somehow limited or overridden by the requirements of Article II.

In the instant case, the executive officer in question has no duties except to carry out a particular statutory mandate, and the President (through the Attorney General) may remove that officer for any reason that "substantially impairs the performance of [those] duties." The lesson we draw from the analysis that follows is narrow and straightforward: at least in the case of executive officers whose duties are limited to implementing the acts of Congress, Congress may adopt a "good cause" standard to limit the President's ability to remove such officers. While the President's constitutional power may grow (and Congress' power to delimit grounds for removal correspondingly may diminish) as the range and nature of an executive officer's responsibilities expand, this case presents no occasion for exploring this more difficult terrain.

We recognize that there may well be executive branch officers—the Secretary of State and the White House Chief of Staff come to mind—as to whom the President does have an absolute power of removal at will. But it is at least equally clear that according the President a broad constitutional power of at-will removal infringes the power of Congress to carry out the legislative responsibilities conferred in Article I. In particular, where Congress determines that the public interest would be

best served through implementation of a given statutory scheme by officers insulated from the influences of immediate political pressures, Congress would be disabled from using limitations on removal as a means to accomplish this obviously legitimate objective.

As we show in this brief, the definition of "'pure' executive officer" employed by the court below gives to the President as a matter of constitutional prerogative an at-will removal power that is far too broad. In this respect, the decision below does not serve the constitutional scheme of separation of powers, but instead infringes on the ability of Congress to legislate in furtherance of legitimate public interests and grants to the President an unlimited power not provided by the Constitution. And the adverse consequences of this aspect of the decision below extend well beyond the immediate parties to this case. The decision wrongly casts into doubt a wide variety of existing and important institutional arrangments.

ARGUMENT

1. *The Constitutional Text.* The question of what limits Congress may by statute place on the President's ability to remove an executive officer is not answered *in terms* by the text of the Constitution or by any of the contemporaneous materials that sometimes throw light on the intention of the Framers. However, the constitutional text provides the principles that govern resolution of this question.

a. The place to begin is where the Constitution begins: *viz.*, with the role of Congress. Does Article I of the Constitution empower Congress to enact statutory standards limiting a President's ability to remove some or all officers of the Executive Branch? If the answer is in the negative, the inquiry need not proceed further. If the answer is in the affirmative, then it is necessary to confront the question whether this legislative authority

is overridden or limited by any other provision of the Constitution.

The authority to legislate standards governing the process for removing executive officers seems well within the terms of the legislative power vested in Congress by Article I. Section 8, cl. 18 of that Article grants to Congress the power:

> To make all laws which shall be necessary and proper for carrying into *execution* the foregoing powers, *and all other powers vested by this Constitution in the government* of the United States, *or in any department or officer thereof.* [Emphasis added.]

These words affirmatively cover, rather than exclude, laws directed to the Executive Branch. By this clause, Congress is authorized to enact laws governing the manner and means by which the Executive is to carry out the responsibilities entrusted to that Branch by the Constitution or by statute. Certainly, as a matter of English usage an enactment specifying the standards for removing a federal officer entrusted with carrying out federal law is a law "for carrying into execution . . . powers vested by this Constitution in the government of the United States, or in any department or officer thereof." And this understanding of the Constitution's words has been acted on from the beginning. Pursuant to this clause, Congress has in fact established the executive offices, defined their structures, functions and duties, set the qualifications for the appointment of executive officers *and* determined the standards under which those officers may be removed.

b. The question as to the nature and extent of Congress' power to legislate respecting standards for removal of executive branch officers thus reduces to whether Article I's *express* grant of authority is somehow limited by an overriding grant of authority to the President. And any such grant must be implied: *nothing* in the Constitution expressly states that the President must have the power to remove at will officers of the Executive Branch.

The absence of an express constitutional limitation on Congress' ability to legislate restrictions on the President's ability to remove executive officers is not, of course, necessarily conclusive. It is appropriate to ask whether such a limitation should be implied from some general grant of authority to the President. In this regard, two aspects of the grant of executive power in Article II bear investigation.

First, Article II, § 3 provides that the President shall "take care that the laws be faithfully executed." This provision places upon the President ultimate responsibility for execution of the laws, and may be assumed to require that Congress not deprive the President of the means to carry out his constitutional duties. It is certainly arguable that if, in a given instance, the President lacks sufficient control of an executive officer charged with particular law execution responsibilities, the President will not be able to satisfy his Article II, § 3 responsibiilty.

Second, Article II, § 1 vests "the executive power" in a single executive. The Framers rejected the notion of multiple executives in significant part because the fragmentation of executive power would make it too difficult to hold anyone politically accountable for the exercise of the executive power. See The Federalist No. 70 (A. Hamilton) (J. Cooke ed., 1961)); see also, Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 599-601 (1984). If the President were deprived of control over an officer with law execution responsibilities, the result arguably could be a fragmentation of executive power and a loss of political accountability.

In assessing whether these concerns come into play in this case, it is important to be clear both about the nature of duties of the executive officer here and about the substance of the limitation here on the President's ability to effect a removal.

The independent counsel's sole charge is to carry out the mandate of a particular statute, the Ethics in Government Act. This mandate was created, defined and limited by Congress in pursuit of valid legislative goals through the legislative process (in which, of course, the President played his full constitutional role). The task of the independent council is only to execute the will of Congress as expressed in this statute.

Part of the will of Congress is that the independent counsel should carry out her work with a measure of insulation from the pressures of short-term political influences. This insulation is in part provided by the removal provision, which permits the President, through his agent the Attorney General (*see* n.1, p. 3, *supra*), to remove the independent counsel from office "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties," 28 U.S.C. § 596(a)(1).

In this context, any claim that a "good cause" removal provision deprives the President of the ability to "faithfully execute" the law proceeds by assuming its conclusion. Here, the law to be executed was enacted by Congress. The removal provision is an integral part of a statutory scheme that Congress crafted to further what Congress believed to be the public good. In connection with this statute, the President's "faithful execution" obligation requires him to assure that the will of Congress as expressed in the statute is carried out. If it is the will of Congress that, for reasons of insulation from short-term political pressures, the officer charged with responsibility for carrying out a particular statutory mandate be removable only for "good cause," then the President would discharge his responsibility to "faithfully execute" the law by observing this limitation on his power of removal. An ability to remove this officer at will is not necessary to—and indeed would be inconsistent with—

the faithful execution of this statute, as Congress wrote the enactment and as the President signed the Act into law.

By definition, moreover, a statutory removal standard of the type here does *not* diminish the President's ability to assure that an executive officer properly executes the substance of a statutory mandate. The President may accomplish removal of the officer here if for any reason the officer's performance of the executive function is "substantially impaired." The President thus retains sufficient control to assure "faithful execution" of the law the officer has been appointed to execute.

Similarly, the "good cause" aspect of the removal provision here cannot be said to effect an unconstitutional fragmentation of the executive power. This Court has not had occasion to define the minimal level of control the President must have over executive officers to effectuate the concept of a unitary executive. Presumably, however, if the President were deprived of all power to remove an executive officer, there would be an unconstitutional fragmentation of executive power.[2] And, beyond that, Professor Strauss has stated what seems to be the practical essence of the concept:

> The unitary responsibility thus expressed, and sharply intended does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally

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[2] Some accountability would exist even in the absence of any power to remove. See Art. II, § 2 (the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments"). In this connection, it has been pointed out that the fact that the Framers found it necessary to spell out this right to obtain written opinions seems inconsistent with the understanding that the President would always have the right to remove such officers at will. See Corwin, *Tenure of Office and the Remand Power Under the Constitution*, 27 Colum. L. Rev. 353, 397 n.102 (1927).

> believe in that responsibility. The charge to "take care [that the laws be faithfully executed"] implies that congressional structuring must in some sense admit of his doing so. An effort, then, to establish an agency over which the President's control went no further than the power to appoint its heads should be found deficient. [84 Colum. L. Rev. at 648-649: *see also id.* at 640-643.]

To determine whether the degree of presidential control is sufficient to meet this test, the first question is: for what is the President to be held ultimately accountable? In our view, where the administration and elaboration of a federal enactment is at stake, the responsibility of the President is plainly and simply for execution of the law Congress has passed and not for crafting a law the President wishes to execute.

The "good cause" standard leaves the President ample authority to assure that the executive officer here is competently performing her statutory responsibilities in the manner the statute provides. And, in carrying out a congressional enactment, competent execution according to Congress' will is the nature of the task given to the Executive Branch. In this instance, then, the "good cause" limitation on the removal leaves the President in a position of full accountability for the task given to the Executive Branch, and leaves the Congress in a position of full accountability for the wisdom or the lack of wisdom of the statute Congress has passed.

This understanding of the respective responsibilities of Congress and the President is at the heart of our constitutional system. It is in the nature of the constitutional scheme that to a great extent "the executive power" is defined and limited, both in substance and procedure, by statutes enacted by Congress. See Strauss, *supra*. The laws that the President is to "faithfully execute" are for the most part laws adopted by Congress. By and large statutes enacted by Congress define the substantive standards the President has the obligation to implement and often prescribe the procedures the Executive is to follow in performing that duty. The offices and resources at the President's disposal in carrying out the congressional will are similarly provided and organized pursuant to congressionally enacted laws. Thus, the President's role in executing the laws is primarily dedicated to carrying out the will of Congress as expressed in statutory enactments.

The principles we have followed in analyzing the instant case are no different than those that have always been accepted as applicable to the President's power to appoint officers of the United States; a power, unlike the "power of removal," that is *expressly* conferred upon the President by the Constitution. Art. II, § 2. cl. 2. As is the case with the question of removals, the Constitution is silent as to whether Congress may prescribe by statute standards governing the appointment of executive officers. But there is no doubt that Congress has that power.

It is Congress—not the Constitution—that creates the offices, and it has been unquestioned from the outset that Congress may establish by statute, not only the substantive duties of executive officers, but also the qualifications for appointment to the various offices the President has the authority to fill, the terms of such offices, the salaries of such offices, and other conditions and incidents of the appointment process. As James Madison stated in the course of the now-famous debate over "the Decision of 1789," the "Legislature creates the office, defines the powers, limits its du ation and annexes a compensation." 1 Annals of Cong. 581, quoted in *Myers*, 272 U.S. at 128-129. *See also*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1 (1983). The adoption of legislative standards governing removal from executive offices of the type before the Court in the instant case is, we believe, analytically indistinguishable from the

adoption of legislative standards to govern the appointment power:

> Until Congress has acted there is no office to which there may be appointment or from which there may be removal. Everybody concedes . . . that Congress may stipulate the qualifications of appointees, short of designating a specific eligible, although the power of appointment is thereby curtailed. What, then, is to prevent Congress from fixing the tenure of an office created by it with resultant curtailment of the removal power? So far as the principle of the separation of powers is concerned the two things stand on precisely the same footing, while in practice they may be but different phases of the same thing, since security in office may be the *sine qua non* of the kind of behavior which an office requires for the successful discharge of its characteristic duties. [Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 386 (1927).][3]

c. So far in this brief, we have focused exclusively on legislative standards for the removal of executive officers whose sole responsibility is to execute a particular statutory mandate. In that context, as we have shown, a "good cause" standard is not in any respect in tension with the principles underlying Article II. The officer at issue in this case, and the other executive officers as to whom Congress has adopted standards for removal (see *infra* at 20 & n.8), all fall into this category. For the disposition of this case, it is unnecessary to carry the analysis further. But, to place the issue in perspective, it is important to recognize that other executive officers have duties of a different nature and stand in a different relationship to the President.

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[3] We note that since it is well settled that the express appointment power is subject to legislative definition, the often repeated suggestion that a removal power can be implied from the appointments clause does nothing to advance the resolution of the issue we address in this brief.

The Secretaries of State and Defense, for example, are charged, *inter alia*, with assisting the President in the execution of powers that derive not from any statutory mandate but from an express conferral of power upon the President by the Constitution. And these and other cabinet officers and White House officials generally stand in a relationship of confidential advisor to the President. *Cf. United States v. Nixon*, 418 U.S. 683, 703 (1974). In circumstances such as these, limitations on the President's ability to remove may be inconsistent with the Article II principles that we have discussed. *See* Corwin, *supra*, 27 Colum. L. Rev. at 392-394; Nathanson, *Separation of Powers and Administrative Law: Delegation, Legislative Veto, and the "Independent Agencies,"* 75 N.W.U.L. Rev. 1064, 1099-1109 (1981). *See also Bowsher*, 106 S.Ct. at 3207 (White, J., dissenting) ("[T]here are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President").

Because some executive offices may combine the attributes just discussed with responsibilities for executing particular statutory mandates, it may be difficult to define with precision the category of executive officers as to whom Article II requires that the President retain the ability to remove at will. There is no occasion in this case to undertake that task, for here, as we have discussed, the sole responsibility of the officer in question is to execute a particular statutory mandate. As to such an officer, nothing in Article II overrides the authority of Congress pursuant to the necessary and proper clause of Article I to adopt a "good cause" limitation on the President's removal power.

2. *This Court's Decisions.* This Court's decisions have not definitively treated the question of the circumstances in which Congress may legislate standards governing the President's ability to remove an executive officer. But the

general thrust of this Court's opinions is entirely consistent with the textual analysis of the Constitution set forth above.

Myers was the first case to address the question of the President's removal power. The issue in *Myers* was *not*, however, whether Congress may prescribe by statute standards that govern removal by the President. The statute at issue in *Myers* did not purport to set any standards governing removal. Rather, that statute provided for Congress' *participation* in the actual removal decision by means of the advice and consent procedure. The issue thus raised, like the issue in *Bowsher*, was the propriety of direct congressional involvement in the process for removing an officer charged with execution of the laws. And, the *Myers* Court, like the *Bowsher* Court, found such involvement to be unconstitutional. There are, to be sure, broad *dicta* in *Myers* suggesting that Congress may not establish standards limiting the President's removal powers. These *dicta* are, however, unsupported by the constitutional materials cited in *Myers*.[4] Particularly because that is so, the best reading of that decision is the one suggested by Professor Strauss:

> *Myers* can readily be limited to the issue presented by the provision for senatorial concurrence in removal, the Tenure of Office Act problem. Although the *Myers* Court talked at times as if it regarded the use of fixed terms of office and "for cause" requirements to restrict the President's removal authority as equally difficult, that equation is not convincing. Reservation of senatorial approval for removals suggests political power struggles between President and Senate that are not connoted by a judgment that fixed tenure in office, with limitations on discharge, will be useful for the ends of public policy. [84 Colum. L. Rev. at 614 (footnote omitted); *see generally*, Corwin, *supra*, 27 Colum. L. Rev. 353.] [5]

This Court's opinion in *Bowsher*, it seems to us, reads *Myers* in this limited fashion. The *Bowsher* Court described *Myers*' holding as follows: the *Myers* Court held "the statute unconstitutional on the ground that for Congress to 'draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of separation of governmental powers.'" 106 S.Ct. 3188 (quoting 272 U.S. at 161). The *Bowsher* Court also stated: "*Humphrey's Executor* [*v. United States*, 295 U.S. 602 (1935)] involved an issue not presented either in the *Myers* case or in [*Bowsher*]—*i.e.*, the power of Congress to limit the President's powers of removal of" an executive officer. 106 S.Ct. at 3188. And, consistent with the same understanding, *Humphrey's Executor*, decided 10 years after *Myers*, upheld a statute permitting the President to remove Federal Trade Commissioners only "for inefficiency, neglect of duty, or mal-

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[4] The *Myers* court relied heavily on the debate over the "Decision of 1978." That debate was addressed to the question whether Congress could *participate* in the removal process, and not to the question whether Congress could set standards that govern removal by the President. Thus, the opinion in *Myers* describes the issue debated in 1789 as follows:

> It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the *power of the President under the Constitution to remove* the Secretary of Foreign Affairs *without the advice and consent of the Senate*. That was what the vote was taken for. [272 U.S. at 114 (emphasis added); see also *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).]

And, not surprisingly, statements throughout the debate focused on the issue thus defined.

[5] Indeed, the Solicitor General's brief and oral argument in *Myers* conceded "that the power of removal may be subject to such general laws as do not destroy the exercise by the President of his power of removal, and which leaves to him the exercise of the power subject to such general laws as may fairly measure the standard of public service." Substitute Brief for United States on Reargument in No. 2, O.T. 1926, p. 9 (cited in *Bowsher*, 106 S.Ct. at 3196 n.4 (Stevens, J., concurring)).

feasance in office." 295 U.S. at 620. This holding establishes that functionally related removal restrictions need not threaten "the equilibrium [between President and Congress] established by our constitutional system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). See also *Weiner v. United States*, 357 U.S. 349 (1958).

We would be less than candid if we did not admit that in articulating the distinction between its holding and what was said in *Myers*, the *Humphrey's Executor* Court adopted a line of reasoning that is less than satisfactory. Thus, *Humphrey's Executor* limited the *dicta* in *Myers*—that the President has an illimitable power of removal—"to include [only] all purely executive officers." 295 U.S. at 627-628. And, the opinion then defined commissioners of the Federal Trade Commission out of that category by characterizing their functions as "quasi-legislative or quasi-judicial powers" and by characterizing the FTC "as an agency of the legislative or judicial department of the government." *Id.* at 628.

Such characterizations obscure rather than illuminate analysis. If there is a core executive branch activity, it is carrying out the objectives of duly enacted statutes. It is, of course, often possible to characterize the responsibilities placed on executive officers in conducting such executive activity as in the nature of a "legislative" or "judicial" task. Any authority delegated by Congress respecting determinations that make a general rule concrete in a particular instance and that Congress might have made itself could be termed in the nature of a legislative authority, or because the delegee is to determine what the general rule means could be termed in the nature of a judicial authority. But such characterizations have no meaning in the present context. However characterized, these activities must be performed by executive officers who have some continuing accountability to the President, otherwise the task of statutory implementation would be

performed wholly outside the political structure of our government. Regardless of the nature of the executive activity, the constitutional concerns that must be met are those described in part 1, *supra*.

This is not to say that phrases such as "quasi-legislative" or "quasi-judicial," while inexact, are not suggestive of situations where Congress may appropriately enact standards governing the President's ability to remove. These phrases are usually associated with circumstances where Congress might properly find good reason for insulating an executive officer from at-will removal by the President, and where the nature of the officer's responsibilities are such that a "good cause" removal provision would not be at odds with Article II's requirements that the executive power is to be vested in a unitary executive who may be held accountable for "faithful execution" of the laws. However, the limitations on at-will removals in such situations are constitutional not because the officers are "quasi-legislative" or "quasi-judicial," but because these constitutional requirements are satisfied. If these requirements may be satisfied in cases of removal limitations for executive officers who are not "quasi-legislative" or "quasi-judicial," then those limitations too should be found consistant with the Constitution.[6]

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[6] *See Bowsher*, 106 S.Ct. at 3207 n.3 (White, J., dissenting):

> Although the Court in *Humphrey's Executor* characterized the powers of the Federal Trade Commissioner whose tenure was at issue as "quasi-legislative" and "quasi-judicial," it is clear that the FTC's power to enforce and give content to the Federal Trade Commission Act's proscription of "unfair" acts and practices and methods of competition is in fact "executive" in the same sense as is the Comptroller's authority under Gramm-Rudman—that is, it involves the implementation, (or the interpretation and application) of an act of Congress. Thus, although the Court in *Humphrey's Executor* found the use of the labels "quasi-legislative" and "quasi-judicial" helpful in "distinguishing" its then-recent decision in *Myers v. United States*, 272 U.S. 52, (1926), these terms are hardly of

Since *Humphrey's Executor*, this Court has moved away from reliance on the characterizations used in that case and toward a method of stating its analysis that more clearly expresses the operative constitutional principles. Thus, in *Buckley v. Valeo*, 424 U.S. 1, 140-141 (1976), the Court recognized that regardless of the labels that might be applied, functions of the type performed by the commissioners in *Humphrey's Executor* must be considered to be within the domain of the Executive Branch:

> All aspects of the [Federal Election Campaign] Act are brought within the [Federal Election] Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress or the Executive Branch are more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. *Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law.* While the President may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration

any use in limiting the holding of the case; as Justice Jackson pointed out, "[t]he mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-488, 72 S.Ct. 800, 810 96 L.Ed. 1081 [1952] (Jackson, J., dissenting).

> and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States." [Emphasis added; footnotes omitted.]

Then, in *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), the Court adopted a general test for use in separation of powers cases, which, unlike the "quasi-legislative" and "quasi-judicial" test, is fully responsive to the pertinent constitutional concerns:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.

Under this test, the constitutionality of a statute limiting presidential removals from office would turn on application of the principles discussed in part 1, *supra*.[7] We submit that the same mode of analysis should be applied here. And, as we showed in part 1, under that analysis the "good cause" removal provision here at issue does not violate the Constitution.

3. *Practical Implications of the Ruling of the Court Below.* Although the statute under consideration in this case is unique in a number of ways, that statute is far from unique in its provision of a "good cause" limitation on the President's ability to make removal. It has become a tenet of our modern government that various law execu-

[7] In *Bowsher*, only Justice White, in his dissenting opinion, reached the issue whether " 'executive' powers of the sort granted the Comptroller by the Act may only be exercised by officers removable at will by the President." 106 S.Ct. at 3206. Justice White made that determination based on the above-quoted standard from *Nixon v. Administrator of General Services*. *Id.* at 3207. In applying that standard—and finding that the "good cause" removal standard in that case was consistent with the requirements of Article II—Justice White looked to the kinds of factors discussed in part 1, *supra*.

tion functions may be best conducted—and may be conducted with the highest level of public confidence—by officers who are insulated, at least to some degree, from short term political influences. In large part, the mechanism that Congress has chosen to accomplish this insulation has been the enactment of statutory limitations on the President's ability to remove. *See Humphrey's Executor*; *Weiner v. United States*. Based on precisely the kinds of policy judgments that the Constitution grants Congress the authority to make, Congress has on myriad occasions established executive offices to enforce statutory commands and has placed restrictions on the President's powers to remove the office-holder without good cause.

Thus, for example, the members of the Board of Governors of the Federal Reserve System are appointed for fourteen-year terms "unless sooner removed for cause by the President." 12 U.S.C. § 242. Members of the Federal Trade Commission, 15 U.S.C. § 41, the Nuclear Regulatory Commission, 42 U.S.C. 5841(e), the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b), and the Interstate Commerce Commission, 49 U.S.C. § 10301, all serve for specified terms with the protection that the President may only remove them "for inefficiency, neglect of duty, or malfeasance in office." And, the National Labor Relations Board's members each enjoy both substantive and procedural protections: "Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." 29 U.S.C. § 153(a).[8]

[8] For further examples of similar restrictions on the President's removal power—reflecting the wide variety of executive branch contexts in which Congress has over the years enacted such restrictions—*see, e.g.*, 5 U.S.C. § 1202(d) (Members of the Merit Systems Protection Board); 5 U.S.C. § 1204 (Special Counsel for the Merit Systems Protection Board); 5 U.S.C. § 7104(b) (Members of the Federal Labor Relations Authority); 12 U.S.C. § 3013(a) (Board of Directors of National Consumer Cooperative Bank); 15 U.S.C. § 2053(a) (Members of the Consumer Product Safety Commission); 39 U.S.C. 3601(a) (Members of the Postal Rate Commission); 42 U.S.C. § 8718(a)(4) (Inspector General of the Synthetic Fuels Corporation). Many more examples could be cited.

These examples manifest a serious effort by Congress, in a variety of contexts, both to address the need in certain circumstances for executive branch decision-makers to be able to pursue their mandates to enforce statutory law insulated from immediate political influences, and to respect the powers and prerogatives of the President. The court of appeals' decision that the "good cause" provision of the Ethics in Government Act violates the Constitution calls into question many of these long-standing, well-established governmental arrangements. The reasons offered by the court below to justify the conclusion that Congress may not constitutionally limit the President's power to remove an independent counsel apply with equal force to many other executive offices with respect to which Congress has established removal restrictions, including the very office for which this Court has unanimously upheld removal restrictions: the office of FTC commissioner. *See Humphrey's Executor.*

The court below began from the premise that under *Humphrey's Executor* the courts are required to distinguish between "quasi-legislative" and "quasi-judicial" officers on the one hand, and "purely executive officers" on the other, with *Myers* establishing "an absolute prohibition on any restriction of the President's power to remove a purely executive officer." Pet. App. 45a-46a. Although, in the years since the *Humphrey's Executor* decision, this Court has made clear that the offices for which Congress is entitled to mandate removal limits exist within the Executive Branch, *see, e.g., Buckley v. Valeo*, 424 U.S. at 140-141, the court below went on to define the class of "purely executive officers" as potentially encompassing virtually the entire Executive Branch:

> [I]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of

> "execution of the law" and the exercise of judgment "concerning facts that affect the application of the [law]" is another characteristic of the executive function . . . . The independent counsel is a fortiori an executive officer under this definition. She must determine whether facts uncovered in her investigation may constitute illegal conduct; in order to make this judgment, she must "interpret[] a law enacted by Congress. [Pet. App. 50a (quoting *Bowsher v. Synar*, 106 S.Ct. at 3192).]

By this definition such officers as the members of the Board of Governors of the Federal Reserve System, the Federal Trade Commission, the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, the Interstate Commerce Commission, and the National Labor Relations Board (as well as officers of other of what we have come to know as independent regulatory agencies); would be deemed "purely executive" officers and thus would be subject, as a matter of constitutional law, to at-will removal by the President. In each instance, those officers are charged with the task of "[i]nterpreting a law enacted by Congress to implement the legislative mandate" and "exercis[ing] judgment concerning facts that affect the application of the [law]."

This outcome is not surprising since the standard used by the court below to define the set of offices as to which removal limits are impermissible is, in fact, taken from *Bowsher*'s description of the overall function of the Executive Branch. *See* 106 S.Ct. at 3192 ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law"). But the question is not whether these officers are part of the Executive Branch. That much is by now beyond dispute. The question is whether Congress may adopt "good cause" limitations on the President's ability to remove these officers. As we showed in part 1, *supra*, the standard employed by the court below is not addressed to the constitutional considerations that should govern the answer to that question.

To bolster its conclusion, the court below went on to assert that "the core executive nature of the prosecutorial function" mandated that a prosecutor be classified as a "pure[ly] executive officer" to ensure that "the President retain the power to remove core executive officers at will." Pet. App. 50a-51a. Again, numerous federal officers and agencies long-governed by "good cause" removal restrictions play prosecutorial roles in the enforcement of federal statutes. *See, e.g.*, 15 U.S.C. § 45(m) (FTC has authority to prosecute actions for civil penalties for unfair methods of competition); 15 U.S.C. §§ 2061, 2071, 2076(7)(A) (Consumer Product Safety Commission has authority to prosecute actions for injunctive enforcement of Act and seizure of hazardous products); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (generally describing agency enforcement and non-enforcement decisions as involving the discretionary use of coercive force and thus analogous to the exercising of traditional prosecutorial discretion). More important, the court below provides no principled basis for exempting offices with prosecutorial functions in particular from congressionally mandated removal restrictions. Nothing in the principles of Article II, discussed in part 1, *supra*, provides the basis for such a distinction. The court below simply asserted that this is a "core domain[] of presidential responsibility" and thus must be within the President's unrestricted power of removal. Pet. App. 53a.[9]

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[9] The opinion below does seek to distinguish traditional agency enforcement powers from the independent counsel's powers on the basis that agencies like the FTC are "part and parcel of the very statutes [the agencies were] assigned to enforce," while the independent counsel only has the authority to enforce "pre-existing" laws. Pet. App. 49a-50a. Once again, the opinion does not explain why the asserted distinction should have any constitutional significance. In any case, however, the distinction is inaccurate: for example, the FTC as well as other agencies have authority to enforce federal antitrust laws, which are certainly "pre-existing" laws rather than the laws under which these agencies were established. 15 U.S.C. § 21 (authorizing Interstate Commerce Commission, Federal Com-

In sum, the distinctions drawn by the court of appeals are derived neither from significant differences between independent counsels and the myriad other executive officers traditionally governed by removal restrictions, nor from any principles stated in Article II. If that court's reasoning is sufficient to invalidate the independent counsel law, its separation of powers theory will not be easily cabined, and myriad federal statutes will be called into doubt.

This Court should not readily imply principles from the Constitution that work such a consequence. Indeed, in cases like this one, that caution is implicit in the constitutional scheme. As we have discussed, Congress has in a variety of contexts made a serious effort to address the inherent tension between the need in some circumstances for decision-makers who are insulated from immediate political influences and the need for a politically accountable Chief Executive. And it is the *political branches*, working through the legislative process, that the Framers intended would be responsible for working out solutions to these sorts of structural dilemmas. The Federalist No. 51 (J. Cooke, ed. 1961) (Madison). The Constitution provides directly for the three institutions at the apex of the federal government—the Congress, the President, and the Supreme Court, and

> "[t]he remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one

munications Commission, Board of Governors of the Federal Reserve System and Federal Trade Commission to enforce antitrust laws).

> body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control.
>
> [This] judgment leaves Congress free in particular cases to choose among a variety of relationships the President might have with those who actually do the work of law-administration . . . . [Strauss, *supra*, 84 Colum. L. Rev. at 667.]

Congress in enacting "good cause" removal standards is operating wholly within the legislative sphere. There may be ample room for debate over whether these congressional judgments have been wise or unwise. There is, however, no reasonable basis for the argument that Congress' efforts in this regard to promote the disinterested and principled execution of the laws are threats to the structure of our system of government. In this context, the Constitution and original materials leave no doubt that the political branches are accorded a broad area of freedom within which to reach *any* of a multitude of practical arrangements in working out the structure of the government and to vary those arrangements from time to time based on experience. The Federalist No. 51, *supra*. This Court should be slow to limit that freedom through a set of rules drawn out of the Constitution by the delicate—and hazardous—process of implication.

CONCLUSION

For the foregoing reasons, on the issue addressed in this brief the decision of the Court of Appeals should not be upheld.

Respectfully submitted,

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No. 87-1279

Supreme Court, U.S.
FILED
MAR 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,

Appellant,

—v—

THEODORE B. OLSON, EDWARD C. SCHMULTS, and CAROL E. DINKINS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AMICUS CURIAE IN SUPPORT OF APPELLANT

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No. 87-1279

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,

Appellant,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF CENTER FOR CONSTITUTIONAL RIGHTS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Center for Constitutional Rights, a not-for-profit organization, hereby respectfully moves for leave to file the attached brief as amicus curiae in this case. The oral consent of all parties has been received. (Telephonic consent has been received

from Alexia Morrison, Esq., appellant; Thomas S. Martin, Esq., counsel for appellee Olson; Jacob A. Stein, counsel for appellee Dinkins; and Brendan Sullivan, counsel for appellee - Schmults.) However, due to the expedited nature of this appeal and the restricted amount of time for securing the consents, those consents have not been received in writing.

The interest of amicus arises from its commitment to the enforcement of constitutional rights and to the representation it has provided over the past two decades to individuals and organizations attempting to hold public officials accountable for violations of constitutional rights. Movant believes there is no more important principle which underlies the Constitution of the United States than that of official accountability under law. It believes

that the brief it submits herewith will assist the Court in establishing that the opinion of the majority in the Court below was seriously flawed in its affirmance of unconstrained Executive power, and, if upheld, would jeopardize this nation's 200-year old commitment to the rule of law.

Respectfully submitted,

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No. 87-1279

IN THE
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October Term, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AMICUS CURIAE IN SUPPORT OF APPELLANT

In this action, Alexia Morrison, independent counsel, appeals from a final judgment of the United States Court of Appeals for the District of Columbia Circuit, dated January 22,

1988, which held the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. Sec. 49, 591 et seq., contravene the Appointments Clause of the Constitution, Art. II, Sec. 2, cl. 2, the separation of powers principle and the limitations of Article III. (The Opinion of the Court of Appeals is printed in the Appendix to the Jurisdictional Statement beginning at 1a. All references to that opinion will be to that Appendix.)

INTEREST OF AMICUS CURIAE

The Center for Constitutional Rights, a non-profit organization, was founded in 1966 to serve the Southern civil rights movement. It has a history of providing pro bono legal services to individuals and groups on some of the most important ethical, moral and legal issues of our times -- racial justice, women's rights, international human rights, First Amendment freedoms, criminal justice and government misconduct.

The Center is dedicated to applying the letter and spirit of the Constitution to the unfolding struggle for human freedom. For two decades it has been in the forefront of providing vigorous legal support to individuals and social movements whose constitutional rights have been infringed upon

or denied. Its attorneys have argued some of the major constitutional cases before this Court over those two decades, including United States v. United States District Court of the Eastern District of Michigan, 407 U.S. 297 (1972), which affirmed the principle that no one in this country is above the law.

The Center is firmly committed to enforcement of the rule of law and the accountability of public officials for their public actions. For that reason, it advocates the independent counsel provisions of the Ethics Act since they respond to a demonstrated need to alleviate the inherent conflict of interest that arises when investigation or prosecution of high level executive officers is undertaken. The Center for Constitutional Rights, as amicus

curiae, files this Brief in support of the constitutionality of the independent counsel provisions of the Ethics in Government Act.

SUMMARY OF ARGUMENT

The independent counsel provisions of the Ethics in Government Act are consonant with both the policy of the Constitution and the structure that it implements. The democratic system by which the United States is governed requires accountability at all levels of government. It is premised on the notion that "no man is above the law." This statute assures that all those who govern are subject to the laws of the land, by providing that in those limited situations where the prosecutorial function is at risk of being tainted by patent conflicts of interest

on the part of the President and Attorney General that function is temporarily assigned to a surrogate. By assuring executive accountability, these provisions of the Act maintain the qualities which distinguish this country from a monarchy and nurture the essential propositions of our democracy.

The process of appointing this special officer is governed by the system of checks and balances. It is harmonious with one hundred years of case law which elucidates the Constitutional mandates for exercise of the appointment power. The doctrine of separation of powers does not prohibit Congress from vesting the appointment power for independent counsel in the judiciary. Because independent counsel are "inferior officers," the designa

tion of the appointing power is, by the specific terms of the Constitution, a matter resting in the discretion of Congress. The judicial appointment of the independent counsel is expressly authorized by the appointments clause and is precisely defined to provide a balanced response to executive overreaching that could place our democratic system of government in jeopardy.

The partial autonomy of independent counsel does not conflict with the President's duty to faithfully execute the laws. In fact, that duty is not an unbounded grant of authority, but rather is language of limitation. It does not mandate absolute control over all prosecutions and is not intended to immunize high government officials from prosecution.

Finally, zealous prosecution of those entrusted with the governance of the United States does not offend their rights as defendants. Neither theory nor practice provides reasons to believe independent counsel are either unscrupulous or single-mined in a quest for conviction. They are invariably reputable and responsible lawyers who have undertaken pivotal duties at critical times in this country's history at the behest of equally responsible members of the federal judiciary. They perform their special and limited duties only after the Attorney General has conducted a preliminary investigation and has determined that there are reasonable grounds to warrant further investigation of possible wrongdoing by high government officials. Furthermore,

independent counsel are subject to removal for good cause by request from the Attorney General.

And while infringing no rights of putative defendants, the independent status of the special prosecutor assures "even the most cynical members of the public and press that allegations against high level officials will always be examined fairly and objectively." The Special Prosecutor Provisions of the Ethics in Government Act of 1978, 36 Record of the Association of the Bar of the City of New York, 421, 429 (1981).

ARGUMENT

I. THE INDEPENDENT COUNSEL PROVISION IS ONE OF THOSE "AUXILIARY PRECAUTIONS" THE FOUNDERS RECOGNIZED AS NECESSARY TO ASSURE THE PUBLIC ACCOUNTABILITY OF PUBLIC OFFICIALS

James Madison wrote in The Federalist, that "[i]f men were angels, no government would be necessary." Similarly, "if angels were to govern men, neither external nor internal controuls on government would be necessary." But he continued:

> In framing a government which is to be administered by men over men the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government: but experience has taught mankind the necessity of auxiliary precautions.
>
> [The Federalist, No. 51 at 322 (Rossiter Ed., 1961)].

Foremost among those "auxiliary precautions" was a constitutional

scheme of checks and balances which assures that "No man in this country is so high that he is above the law... All officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." United States v. Lee, 106 U.S. (16 Otto) 196, 220 (1882). Cf. United States v. United States District Court of the Eastern District of Michigan, 407 U.S. 297 (1972).

It was the Founders' insistence that in our system, unlike the British model from which it evolved, all public officials be accountable under the law which led an early Supreme Court to declare, "[t]he government of the United States has been emphatically termed a government of laws, and not of men." Marbury v. Madison, 1 Cranch 137 163 (1803).

This notion was recently reiterated in this, the 200th year of the Constitution, by Select Committees of both houses of Congress, which declared: "The idea of monarchy was rejected here 200 years ago and since then the law -- not any official or ideology -- has been paramount." Report of the Congressional Committees Investigating the Iran-Contra Affair, 100 Cong., 1st Sess., Nov. 1987, at 22.

Thus, it was perfectly appropriate for the Congress, in the wake of the trauma of Watergate and the notorious "Saturday Night Massacre" to provide for the appointment of independent counsel to investigate and prosecute criminal wrongdoing by high executive officers free of the taint of self-

protective executive supervision.[1]

To suggest, as did the Court below, that the chief executive, who possesses an unlimited power of pardon in regard to all offenses against the federal government, United States Constitution, Article II, Section 2, was also assigned an uncontrollable supervision over his own and his immediate subor

---

[1]As succinctly stated by Judge Ginsburg in her dissent below:

> The Ethics Acct is designed to function as a control against abuse of executive branch power, It implements the checking aspect of the separated powers. The independent counsel provisions of the Act were developed in response to the Watergate era abuses of executive branch powers, abuses which themselves threatened the balance between the three branches of government. The Act is rooted in the principle that "no man can be a prosecutor or judge in his own case." S. Rep. No. 170, 95th Cong., 1st Sess. 5 (1977), reprinted in 1978 U.S. Code Cong. &. Adm. News 4216, 4221. (110a.)

inates' accountability, is to make a mockery of the principle of checks and balances. Nothing in either the letter or spirit of our basic charter requires such an anomalous result.

II. THE AUTONOMY OF INDEPENDENT COUNSEL DOES NOT CONFLICT WITH THE PRESIDENT'S DUTY TO FAITHFULLY EXECUTE THE LAWS

The Constitutional command that the Executive "take care that the laws be faithfully executed", Art. II, Sec. 3, is not an unbounded grant of power; it is language of limitation.[2] It serves

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[2] See, eg., Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Power, 63 B.U.L.Rev. 69, 90 (1980):

> Indeed the Framers probably included the "faithful execution" clause in the Constitution to limit, not expand, the President's power. The clause was intended to rule out any power

as a constitutional reminder of the centuries long struggle in England against the insistence by absolute British monarchs that the King could decide for himself which laws were or were not to be obeyed. See dissent below at 110a, n. 26. In the instant case, the Executive seeks to use this mandate to faithfully execute the laws as a shield against that very same command. But since ours is a "government of laws, and not of men" Marbury v. Madison, supra, 1 Cranch at 163, officials in high places cannot be allowed to immunize themselves or their subordinates from prosecution.

> for him to dispense with, or suspend the execution of the laws. Thus, the President may not always have the power to direct the execution of the laws, but merely a duty to do so when the laws have not excluded his direction.

High level executive officers are immunized if this Court accepts the holding of the majority below that law enforcement, like foreign affairs, is one of "two core domains of Presidential responsibility," 53a, and, therefore, beyond the reach of independent auditors. However, as the dissent aptly points out, "[i]t is not obvious that prosecution is at the 'core' of the executive branch's constitutionally-assigned functions, in the sense that the job must be kept, in any and all cases, under the President's wing and cover." 108a.

While Art. II, Sec. 2 makes it clear that the President has a central role in foreign affairs, is Commander-in-Chief of the armed forces, makes treaties and receives ambassadors, no mention is made of law enforcement

duties. Although the executive powers are not limited to those enumerated in the Constitution's text, if the Framers considered law enforcement to be a "core" function, it is likely that it would have been listed along with the executive's other central responsibilities. See e.g., The Federalist No. 72 at 435-36 (A. Hamilton) (Rossiter edition, 1961) (Hamilton enumerated executive functions without mentioning law enforcement).

In fact, the Constitution makes no mention of the functions which an Attorney General or Department of Justice might perform since neither seems to have been anticipated by the Framers. Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform, 50 N.Y.U.L Rev. 366, 387 (1975) (hereinaf-

ter "Removing politics"). In view of their delineation of other substantive areas for executive administration, the Framers' failure to assign justice functions might suggest that they could not decide which branch of government would enforce and administer them. Id.

The office of Attorney General was not established until the Judiciary Act of 1789, and the Department of Justice was not created until 1870. Id. at 369. Coupled with the decentralized nature of prosecution during the Federalist period and the absence of textual reference in the Constitution, the majority below lacks support in referring to prosecution as a core executive function.

Further, the concept that a "unitary executive" guarantees accountability, See Opinion below at 27a, fails where

the President himself or his top aides are the target of investigation or prosecution. The majority below asserts that "[f]or no federal government function is it more vital to the protection of individual liberty that ultimately the buck stop with an accountable official -- the President -- than in the prosecution of criminal laws." 27-28a. This rationale crumbles, however, when the Chief Executive or his high level appointees are the subject of investigation. "[U]nless there are some limits to executive control of the mechanisms for law enforcement, the concept of accountability could be circumvented by a corrupt executive intent upon obstructing the machinery of justice and the operation of the political process."

The Proposed Court-Appointed Special

Prosecutor: In Quest of Constitutional Justification, 87 Yale L.J. 1692, 1692-93 (1978).

If the highest levels of the executive branch are to be truly accountable to the people, it is essential that the necessary investigations will be made and the requisite information will reach the public. Id. at 1695. "If the executive branch is not to be insulated from the pressures of the political system, the prosecutor must be free of executive control during his investigation of alleged corruption." Id.

"Appointment by the President would promote public suspicions that the prosecutor lacked independence to investigate and prosecute members of the incumbent Administration." Removing Politics at 432. That

perception, rather than promoting accountability, would foster the belief that the President was above the law.

The relevant decisions of this Court support the assertion that limitations on the Executive's authority to discharge the independent counsel ("only for good cause, physical disability, mental incapacity, or other condition that substantially impairs the performance of such independent counsel's duties," 28 U.S.C. 596(a)(1) do not violate the principle of separation of powers. In both Humphrey's Executor v. United States, 295 U.S. 602 (1935), and Weiner v. United States, 357 U.S. 349 (1958) this Court upheld congressional authority to impose limitations on the removal power of the President, because the nature of the function exercised by the officials

required exercise of independent judg ment. The same analysis demands that independent counsel must not be subject to removal-at-will by the President, for as the District Court found,"be-yond peradventure the very purpose of the office requires a degree of independence from Presidential con-trol". In Re Sealed Case, No. 87-0197 (July 20, 1987) 138a.

The majority below posited that prohibiting the Attorney General from removing the independent counsel except for good cause "makes executive power a mere mockery." 69a. In postulating this expansive Presidential power, the Court relied almost exclusively on Myers v. United States, 272 U.S. 52 (1926), and reduced the more contem-porary case of Weiner v. United States, 357 U.S. 349 (1957), to a mere foot

note. But Weiner specifically ac knowledged Congress' power to create an office serving an executive function that was free from "the Damocles' sword of removal by the President." Id at 356. Cf, United States v. Nixon, 418 U.S. 683, 694-95, n.8 (1974), rejecting the President's attempt to restrict the autonomy of the special prosecutor as conferred by regulation promulgated by the Attorney General.

The reasoning of the majority below discards half a century of legal developments. This Court in the past has carefully protected Congress' right to create an inferior executive office free from coercive influence. To destroy what this Court has done merely because it "mocks executive power" would be to create an Imperial Presidency which the Framers so eagerly

sought to avoid and to destroy the accountability which a "unitary executive" was designed to nurture.

III. THE DOCTRINE OF SEPARATION OF POWERS DOES NOT PROHIBIT CONGRESS FROM VESTING THE APPOINTMENT POWER IN THE JUDICIARY

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952). (Jackson, J., concurring).

Article II, Sec. 2, cl.2 of the Constitution indisputably gives Congress the discretion to vest the power to appoint inferior officers "in the President alone, in the Courts of

Law, or in the Heads of Departments." The majority below rested its decision on its finding that independent counsel are superior officers because "[t]he magnitude of the task... is constitutionally determinative." 23a. Because the independent counsel's responsibilities and powers are circumscribed both functionally and temporally, the majority opinion below flies in the face of one hundred years of precedent as well as the express language of the appointments clause.

In 1879, this Court identified inferior officers as "officers inferior to those specially mentioned [in the Appointments Clause]." United States v. Germaine, 99 U.S. 508, 509-10 (1879). Clearly, independent counsel are inferior officers by this standard.

Furthermore, a functional analysis

reveals that the powers and duties delegated under the Ethics in Government Act are carefully limited. First, the independent counsel is subject to removal by the Attorney General for good cause, 28 U.S.C. Sec. 596(a)(1), or by the special court if it determines his investigation is either complete or fruitless. 28 U.S.C. Sec. 596(c)(2). Second, he must comply with the policies of the Department of Justice concerning enforcement of the criminal law. 28 U.S.C. Sec. 594(f). Third, his prosecutorial jurisdiction is narrowly circumscribed. 28 U.S.C. Sec. 594(a). Fourth, appropriate Congressional committees must be kept abreast of his activities. 28 U.S.C. 595(d). Finally, he must advise the House of Representatives of "substantial and credible information" that may

constitute grounds for impeachment. 28 U.S.C. Sec. 595(c). Thus, functionally, independent counsel are subject to significant, structured limitations on their power.

A temporal analysis has also been used by this Court to ascertain whether a particular office is superior or inferior. In 1898, this Court declared:

> Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.

United States v. Eaton, 169 U.S. 331, 343 (1898) (Vice-Consul remains an "inferior officer" even when he

replaces the Consul).

Finally, this Court itself has labeled a similar office as being inferior. In United States v. Nixon, 418, U.S. 683 (1974), the Court stated that Congress may vest in the Attorney General the power "to appoint subordinate officers to assist him in the discharge of his duties." Id at 694 (emphasis added). A ruling today by this Court that independent counsel are superior officers whose appointment requires nomination by the President with the advise and consent of the Senate effectively overrules Nixon. If he be subordinate when appointed by the Attorney General, an independent counsel exercising the same functions does not become superior when appointed by a panel of judges.

In keeping with the Constitutional

scheme, the Ethics Act bifurcates the appointment process for independent counsel, giving the executive and judicial branches indispensible roles. The appointment must be initiated by the Attorney General, who applies to the Special Division of the Court of Appeals. 28 U.S.C. Sec. 591(b), (c). The Special Court has no unilateral power. It cannot act until the Attorney General requests the appointment. And the Attorney General's refusal to seek appointment is unreviewable. Nathan v. Smith, 737 F.2d 1069 (D.C.Cir. 1984); Banzhaf v. Smith, 737 F.2d 1167 (D.C.Cir. 1984). Cf. Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986). Except for the selection of the specific person who will fill the temporary role of independent counsel, the appointment process is

entirely under executive control.

Congress exercised its Art. II, Sec. 2 authority for the first time in 1789 when it vested in the district courts the power to appoint (and discharge) the clerks of the court. this Court sustained this exercise of power, noting in dictum that the power to vest the appointment of inferior officers in either the President alone, the Courts of Law, or Heads of Departments implied that the power would be delegated "to the department of the government to which the officer to be appointed most appropriately belongs." That fit the situation before the Court, as "the appointment of clerks of courts properly belongs to the Courts of Law." Matter of Hennen, 38 U.S. 230, 258 (1839). While the appointment in Hennen was clearly intrabranch in

nature, fifty years later this Court upheld the judicial appointment of officers who served an executive function, noting an absence of incongruity in the judicial appointment. Ex Parte Siebold, 100 U.S. 371, 397-98 (1880). The same result was stated in Go-Bart Co. v. United States, 282 U.S. 344 (1931), when this Court emphasized the Congressional power to vest in the Courts of Law authority to appoint officers whose mandate includes "prosecution under laws relating to the elective franchise and civil rights." Id. at 353 n.2.

The lower federal courts have implemented these holdings. They have sustained the authority of Congress to vest in the Courts of Law the power to appoint magistrates (who, with the consent of the parties decide federal

cases with status equal to the judges appointed by the President), Pacemaker Diagnostics Clinic of America v. Instromedix, 725 F.2d 537 (9th Cir. 1984). They have sustained the authority of Congress to vest in the Courts of Law the power to appoint interim United States Attorneys (with full power to prosecute all cases) whenever a vacancy should occur. United States v. Solomon, 216 F.Supp. 835 (S.D.N.Y., 1963). They have sustained the authority of Congress to vest in the Courts of Law the power to appoint the members of the District of Columbia school board. Hobson v. Hansen, 265 F.Supp. 902 (D.D.C. 1967). Thus, interbranch appointment need not be incongruous, especially where, as here, the appointment power cannot be exercised unilaterally and is clearly

fashioned to preclude the inherent conflict of interest or appearance of impropriety which would otherwise inhere in the appointment by the executive of a surrogate to investigate the executive.

Contrary to the majority's assertions in the court below, the Ethics Act does not unconstitutionally withdraw the prosecutorial power from "the cognizance of the branch to which it is constitutionally assigned." 59a, (quoting Commodity Futures Trading Commission v. Schor, ___ U.S. ___, ___, 106 S.Ct. 3245, 3260 (1986)). Rather, the Act responds to the pressures generated by a narrow category of circumstances where the object of the investigation is the conduct of a highly placed executive branch official.

Once the independent counsel is

appointed, the Act carefully provides for his independence from both the executive and judicial branches. The result is a narrow and circumspect "siphoning" of power from one branch without its parallel vesting in another. "[T]he full range of structural values encompassed under the heading of separation of powers," dissent at 104a, is scrupulously preserved, thereby avoiding the "aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). The only diminution of power is the diminution of the executive power to thwart investigations or prosecutions against itself. Appellee's contention that the entire prosecutorial function vests absolutely in the executive is all too opportunistic.

It was the Framer's intent that separation of powers in three co-equal branches of government serve as a check against tyranny. The Framers were well aware that government power is subject to abuse and that the "danger of tyranny or injustice lurk[s] in unchecked power..." K. Davis, Administrative Law Text, Sec. 1.09 at 30 (1972) (emphasis added). By refusing to vest unlimited powers in any one branch of government, the Framers intended that each branch serve as a bulwark against the unlimited exercise of power by the others.[3]

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[3]Alexander Hamilton noted that one of the purposes behind the diffusion of the appointment power in Art. II, Sec. 2 was the need to obviate a "spirit of cabal and intrigue" and to ensure that the President would not select only those whose "insignificance and pliancy will render them the obsequious instruments of his pleasure." The Federalist No. 76, at 455, 458 (Ros-

The Framers conceived separation of power as a means of implementing a system of checks and balances. To ignore this essential connection and to "hermetically seal," Buckley v. Valeo, supra, 424 U.S at 121, the prosecutorial function in the executive branch is to ignore the fundamental reason for a government of separated powers. "[A] mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." The Federalist No. 48 at 313 (Madison, J.) (Rossiter edition 1961). Indeed, as the dissent below stated, there is "irony in the majority's

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siter edition, 1961).

holding that the Act is constitutionally infirm" because it violates separation of powers when the purpose of the Act is to "maintain the structural design that is the genius of our Constitution -- the system of mutual checks and balances." 89a.

The Ethics Act is a balanced response to executive overreaching that has placed our democratic system of government in jeopardy. Under the guise of separation of powers, appellees advocate a return to a rigid compartmentalization which would defeat checks and balances in order to shield the executive branch from outside scrutiny. The court below contends that "the founders chose to risk the potential for tyranny, inherent in placing power in one person, in order to gain the advantages of account-

ability fixed on a single source." 27a (quoting Sierra Club v. Costle, 657 F.2d 298, 405 (D.C.Cir. 1981)). Appellees, moreover, would have us both risk tyranny and forego accountability. Since accountability is rendered meaningless unless "the citizenry... possess[es] the information on which accountability depends, a suspect executive must not be allowed to obstruct processes that may yield damaging allegations." Note, The Proposed Court-Appointed Special Prosecutors: In Quest Of A Constitutional Justification, 87 Yale L.J. 1692, 1699 (1978).

By insulating the executive branch from the principle of accountability, the Court promotes the very executive imperialism rejected by the Framers, who constructed a government designed

to safeguard against tyranny.

An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restricted by the others.

Thomas Jefferson, Notes on the State of Virginia, p. 195, quoted in The Federalist, No. 48, at 310-11(Rossiter edition 1961) (emphasis added).

The Ethics Act is a response to the problem of unchecked executive lawlessness and the threat it poses to the basic structural design of our democratic system. "In a government of laws, existence of the government will be imperilled if [the government] fails to observe the law scrupulously." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J.,

dissenting).

By addressing the obvious need to insure conscientious executive observance of the law while recognizing the reluctance of the executive to bring prosecutions against itself, the Ethics Act creates a bulwark against tyranny and furthers our system of checks and balances.

IV. HYPOTHETICAL FEAR OF OVER-ZEALOUS AND UNSCRUPULOUS PROSECUTORS DOES NOT RENDER THE LAW UNCONSTITUTIONAL

The Court below painted a picture of independent counsel as unscrupulous bounty hunters, driven, in their desire for fame and profit, into overzealous pursuit of their prey. That portrait is both unfair to the dedicated and responsible lawyers who have been selected for this important public service and is unsupported by the real

history of the law's application.

Independent counsel are carefully chosen by a panel of three federal appellate judges who are, themselves, selected by the Chief Justice of the United States.

Under the Ethics in Government Act, appointment of nine independent counsel has been publicly requested by the Attorney General to investigate executive branch officials accused of wrongdoing. In most of these cases, no prosecution has resulted. In only two of the investigations to date have indictments been returned: Franklin C. Nofzinger and Michael K. Deaver were separately convicted of improper lobbying activities after leaving important executive branch positions. Four investigations have been closed

without prosecution.[4]

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[4]On November 19, 1979, Arthur H. Christy was appointed to investigate allegations of cocaine use by Presidential Chief of Staff Hamilton Jordan. On May 28, 1980, Christy issued a report vindicating Mr. Jordan. On Sept. 9, 1980, Gerald J. Gallinghouse was appointed to investigate the use of illicit drugs by Presidential Counselor Timothy E. Kraft. On Jan. 18, 1971, Mr. Gallinghouse issued a report recommending against further investigation. On Dec. 29, 1981, Leon Silverman was appointed to investigate charges of corruption against Secretary of Labor Raymond J. Donovan; that commission was later broadened to include an investigation of perjury. On June 28, 1982, Mr. Silverman filed his report vindicating the Secretary. On April 1, 1984, Jacob A. Stein was appointed to investigate allegations of financial improprieties by then Presidential Counselor Edwin A. Meese III. On Sept. 20, 1984, Mr. Stein filed a report concluding there was no basis for criminal prosecution.

Three investigations are still pending, including the one giving rise to this case. On Dec. 19, 1986, Lawrence E. Walsh was appointed to investigate matters arising out of the Iran-Contra Affair. In 1987, Mr.McKay, who supervised the successful prosecution of Mr. Nofziger, had his jurisdiction broadened to include allegations against Attorney General Meese.

The attorneys who have been appointed as independent counsel have all been well-established, experienced attorneys. They have included former United States Attorney Whitney North Seymour, Jr., who was selected to conduct the investigation of Deaver; and Judge Lawrence E. Walsn, who was appointed special counsel to investigate Oliver L. North and related matters in what has come to be know as the Iran-Contra affair.

These carefully chosen, distinguished lawyers hardly represent the kind of "loose cannons" suggested by the majority below. On the contrary, the independent counsel have invariably been selected because they already possess the substantial reputation and the requisite integrity and disinterestedness that will permit a decision not

to prosecute to be viewed by the public as a justifiable determination and not as a cover-up.

Speculative and hypothetical fears that an unscrupulous prosecutor may someday over-reach in a single-minded quest for fame and glory, See majority op. at 70-74a, is an insufficient basis upon which to invalidate an important public regulation. As this Court has held, "In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980). Nor is there any reason to believe that should the worst-case scenario arise, the rights of a criminal defendant would not be adequately protected by the judiciary, "whose duty it is to make the final decision and whose impartiality serves

as the ultimate guarantee of a fair... proceeding in our constitutional system." Id. at 250.

CONCLUSION

It is a truism that power corrupts; hence our constitutional system of checks and balances and the separation of powers among the coordinate branches of government. Additional prophylactic measures are essential to prevent abuse of power for personal gain; hence the Independent Counsel, to preserve integrity on high, to satisfy the governed that those who govern deserve our continued trust.

The decision of the Court below should be reversed and the constitutionality of the independent counsel provision of the Ethics in

Government Act should be affirmed.

Respectfully submitted,

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Counsel for Amicus gratefully acknowledge the assistance of Linda Katz, Michael Kremen, Georgia Lewis, Patricia Mack, Judy Padow and Ann Williams, students enrolled in the Constitutional Litigation Clinic of Rutgers Law School in the preparation of this brief.

Supreme Court, U.S.
FILED
MAR 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,
v.
THEODORE B. OLSON, EDWARD C. SCHMULTS
and CAROL C. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is a private association that serves as a spokesperson for the legal profession in this country. The ABA is keenly aware of the necessity of preserving public confidence in the administration of justice. As the Commentary to Standard 3-1.2 of the ABA's Standards for Criminal Justice states:

> It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of the office.

Such a circumstance, the ABA believes, arises when the United States Department of Justice is called upon to investigate the conduct of the President, members of his Cabinet or other high-ranking officials appointed by the President.

Motivated by this concern, the ABA over the past fifteen years has taken a particular interest in the need, under certain limited circumstances, for appointment of a temporary independent counsel within the federal government. In 1973, the ABA's Board of Governors called for the appointment of a special prosecutor to investigate the series of events now known as Watergate. The Board then created a special committee to explore ways to insulate law enforcement agencies from improper influences by high-ranking officials in the Executive Branch of government. One critical recommendation of the special committee was that a statutory mechanism should be established to permit the appointment of a temporary special prosecutor by a special court under carefully defined cir-

[1] This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk.

cumstances and standards.[2] The ABA's House of Delegates—the policy-making body of the ABA—overwhelmingly approved that recommendation. The appointment mechanism created by Congress in the Ethics in Government Act of 1978 was based in large part on the ABA's recommendation.

The ABA has repeatedly testified before Congress in support of both the wisdom and constitutionality of the independent counsel statute.[3] The ABA has also filed *amicus curiae* briefs supporting the constitutionality of the statute in two cases that have ruled or opined that the statute is constitutional[4] and in the case from which this appeal is taken.[5] In August, 1987, the House of Delegates reiterated its support for the independent counsel provisions, urging that the legislation be reenacted without a sunset provision. The resulting resolution reiterates the longstanding, fully considered posi-

[2] *See* American Bar Association Report, *Preventing Improper Influence On Federal Law Enforcement Agencies*, (1976), *reprinted in part in Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 259-378 (1976).

[3] *See Oversight of the Independent Counsel Statute: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 57-58 (1987) (testimony of Irvin B. Nathan on behalf of American Bar Ass'n); *Ethics in Government Act Amendments of 1982: Hearing on S. 2059 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 80-81 (1982) (statement of Robert D. Evans, American Bar Ass'n); *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Senate Comm. on Governmental Affairs on S. 555*, 95th Cong., 1st Sess. 42-51 (1977) (statement of Livingston Hall and Herbert S. Miller on behalf of American Bar Ass'n).

[4] *North* v. *Walsh*, 656 F. Supp. 414 (D.D.C. 1987); *Deaver* v. *Seymour*, 656 F. Supp. 900 (D.D.C.), *aff'd*, 822 F.2d 66 (D.C. Cir. 1987).

[5] *In re Sealed Case*, Nos. 87-5261, 87-5264, and 87-5265, slip op. (D.C. Cir. Jan. 22, 1988).

tion of the American Bar Association that the statute is constitutional.

The ABA thus has a strong, continuing interest in monitoring the implementation of the independent counsel provisions of the Ethics in Government Act and in defending their constitutionality.

SUMMARY OF ARGUMENT

The independent counsel provisions of the Ethics in Government Act were carefully crafted by Congress to ensure fairness and the appearance of even-handedness in the exercise of prosecutorial decision-making involving officials at the highest levels of the Executive Branch. A divided three-judge panel of the United States Court of Appeals for the District of Columbia Circuit, over a vigorous dissent by Judge Ruth Bader Ginsburg, reversed the district court decision and held the provisions unconstitutional. In so doing, the panel majority failed to accord deference to Congress' well-considered exercise of discretion expressly delegated to it by the Constitution. The panel majority misinterpreted and misapplied the constitutional text, which empowers the Congress to legislate as it did here, and misinterpreted Supreme Court precedents that support the constitutionality of this law.

Under the Appointments Clause of the Constitution, art. II, § 2, cl. 2, Congress has authority to "vest the Appointment of . . . inferior Officers . . . in the Courts of Law . . ." as well as in the President or heads of departments. Since the independent counsel is not a specifically enumerated officer whose appointment must be made by the President with the advice and consent of the Senate, Congress is entitled to substantial deference in its determination that the independent counsel is an "inferior" officer. In holding the appointment provision unconstitutional, the panel majority failed to accord deference to Congress' rational classification of the independent counsel as an inferior officer. The panel majority unjustifiably read into the Appointments Clause a

requirement that an inferior officer be "subordinate" to a "principal" officer appointed by the President.

The panel majority also held that the Constitution absolutely prohibits interbranch appointments, *e.g.*, judicial appointment of an officer who performs executive functions. That position has no support in the language of the Constitution and is flatly rejected by this Court's precedents. The test established long ago by this Court is whether there is an "incongruity" between judicial appointment and the tasks performed by its appointee. *Ex parte Siebold*, 100 U.S. 371, 398 (1880). There is no such incongruity here. Judicial appointments of prosecutors have been upheld in analogous circumstances. Since every prosecutor serves as an officer of the court with quasi-judicial responsibilities and immunity for performance of official duties, there is no "incongruity" in the judicial appointment of an independent counsel.

The panel majority incorrectly ruled that the removal provision is unconstitutional. That provision is not ripe for resolution because there has been no attempt to remove appellant. Unlike *Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986), this case presents no "here-and-now" issue of one branch's subservience to another that justifies consideration of the removal provision before it is invoked. The removal provision must be invoked by the Attorney General, an officer of the Executive Branch. In any event, the removal provision is constitutional under this Court's decisions in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), *United States* v. *Perkins*, 116 U.S. 483 (1886), and *Weiner* v. *United States*, 357 U.S. 349 (1958). These cases upheld similar restrictions on the President's authority to remove certain officers performing executive functions.

Finally, the panel majority erred in striking down the procedures under which the independent counsel operates. These procedures clearly do not violate any express provision of the Constitution or implicit separation of powers principles. Indeed, they advance those principles by establishing checks and balances on the potential unbridled power of the Executive to investigate and prosecute its own top officers. Contrary to the panel majority's assertions, there are multiple constraints on the independent counsel's discretion, from the limitations inherent in her temporary appointment and the limited scope of her investigation to the provisions for Executive, Judicial and Legislative oversight of various aspects of the independent counsel's responsibilities. The panel majority's speculation about potential abuses and dangers to individual liberties is unfounded.

Based on the express provisions of the Constitution, the Court's long-established precedents, and a proper application of separation of powers principles, the Court should reverse the lower court decision and uphold the independent counsel provisions.

ARGUMENT

I. BACKGROUND: THE INDEPENDENT COUNSEL STATUTE

Unlike the four courts that have viewed the independent counsel provisions as constitutional,[6] the panel majority erroneously struck down Congress' considered response to a grave and recurring practical problem of American government.[7] Congress sought in this enact-

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[6] *In re Olson*, 818 F.2d 34, 43-46 (D.C. Cir. 1987) (unanimous opinion of Senior Circuit Judges MacKinnon, Morgan and Pell); *North* v. *Walsh*, 656 F. Supp. 414 (D.D.C. 1987); *Deaver* v. *Seymour*, 656 F. Supp. 900 (D.D.C.), *aff'd*, 822 F.2d 66 (D.C. Cir. 1987); *In re Sealed Case*, Nos. 87-0197, 87-0205, 87-0215, slip op. (D.D.C. July 20, 1987). Of the nine lower court judges who have considered the constitutionality of the independent counsel provisions, seven have indicated their view that the provisions are constitutional.

[7] On each occasion that Congress has enacted or reenacted the independent counsel provisions, it has heard extensive testimony regarding the constitutionality of such a statute, including testimony from the Department of Justice, which prior to 1981 supported the constitutionality of the statute, *Public Officials Integrity*

ment to create a necessary, but limited, mechanism to insure that credible criminal charges against the highest ranking political officials in the Executive Branch could be investigated and resolved fairly and impartially and with the full confidence of the public. Because the Attorney General is both the chief federal law enforcement officer and a member of the President's Cabinet (and very often a close personal and political advisor), Congress recognized that cases involving "possible wrongdoing by high-level executive branch officials . . . present a fundamental institutional conflict of interest." H.R. Rep. No. 1307, 95th Cong., 2d Sess. 2 (1978); *see* S. Rep. No. 170, 95th Cong., 1st Sess. 5 (1977).

This absence of a sufficient check on the Attorney General was patently documented during the Watergate scandal, when certain officials in the Justice Department, *inter alia*, improperly revealed prosecutorial strategy to the White House and improperly sought to limit the scope of the investigation in its early stages.[8] As the ABA's 1976 Report documents, *see supra* note 2, the problem was by no means confined to those events and has, in fact, been inherent in the uncabined prosecutorial discretion of the Justice Department and its ability to undermine

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Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 14-27 (1977) (statement of John Harmon, Assistant Attorney General, Office of Legal Counsel), as well as arguments by others opposing its constitutionality. After being fully apprised of the legislative history of the constitutional provision at issue, the understanding of the Framers as reflected by their debates and actions in the First Congress, and of the relevant Supreme Court interpretations, Congress concluded on three separate occasions (in 1978, 1983, and 1987) that the independent counsel provisions were constitutional. *See* S. Rep. No. 123, 100th Cong., 1st Sess. 5-6 (1987); S. Rep. No. 496, 97th Cong., 2d Sess. 17 (1982); H.R. Rep. No. 1307, 95th Cong., 2d Sess. 2-6 (1978); S. Rep. No. 170, 95th Cong., 1st Sess. 5-7, 36 (1977).

[8] *The Final Report of the Senate Select Comm. on Presidential Campaign Activities*, S. Rep. No. 981, 93d Cong., 2d Sess. (1974); Watergate Special Prosecution Force, *Report* (1975).

any investigation of persons at the highest levels of any administration. *See* S. Rep. No. 496, 97th Cong., 2d Sess. 5 (1982).

This Court has observed that, "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935). This is consistent with the belief of the Framers of the Constitution in maintaining government *counterpoise*—the need for institutional checks *in addition to* the general sovereignty of citizens through the electoral process.

The panel majority's decision must be reviewed against this crucial background. Only within the framework of limitations and accountability established by Congress in the Ethics in Government Act of 1978 can the special counsel truly be independent.[9]

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[9] A special counsel's independence not only serves the public interest by avoiding both the appearance and reality of a conflict of interest in the Executive Branch, it may also be of great benefit to those persons under investigation. A decision not to prosecute following an independent investigation serves to remove the taint that may occur when a similar conclusion is reached by those closely involved with the target of the investigation, who may be perceived as the beneficiary of political favoritism. As the Reagan Administration has recognized, the independent counsel mechanism is a valuable way of restoring public confidence in the Presidency and the Executive Branch in the wake of allegations of wrongdoing. For example, only a week after the President identified "serious questions of propriety" in the Iran/Contra Affair, N.Y. Times, Nov. 26, 1986, at A10, col. 1, the Attorney General announced plans to apply for appointment of an independent counsel to look into the matter "with the full encouragement and support of the President." N.Y. Times, Dec. 3, 1986, at A11, col. 1. This recognition is also inherent in President Reagan's signing the bill into law on two occasions, though he expressed doubts about the law's constitutionality in 1987. It is difficult to reconcile these purported doubts with the Administration's twice signing and declining to veto the legislation, or with its ready invocation of the independent counsel provisions when it appears desirable. *See also* N.Y. Times, Mar. 23, 1985, at A1, col. 6 (Edwin Meese III makes public request for

II. THE INDEPENDENT COUNSEL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT ARE CONSTITUTIONAL

In deciding cases implicating separation of powers principles, the Court has emphasized that the three branches of government are not "hermetically" sealed from one another. *INS* v. *Chadha*, 462 U.S. 919, 951 (1983); *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976). This is so because, as Justice Jackson stated in his concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

343 U.S. 579, 635 (1952).

The Court's approach to separation of powers issues has been flexible and pragmatic, seeking at every turn to address the Framers' concern that Congress not overreach the bounds of its constitutional role by arrogating to itself the power to execute laws.

The panel majority's rigid, absolutist analysis leads away from such an approach, reasoning instead from far-fetched hypotheticals that disregard the realities of governance.[10] This Court should instead be guided by the language and intentions of the Framers as well as its own precedents to conclude that the independent counsel

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appointment of independent counsel to investigate charges against him); Wash. Post, Apr. 29, 1986, at A1, col. 5 (Michael Deaver; same); N.Y. Times, Dec. 23, 1981, at A1, col. 1 (Raymond Donovan; same).

[10] For example, the majority decision states that unless the statute is declared unconstitutional "it is difficult to see . . . why Congress could not delegate to a particular court—. . . one district judge —the appointment of all Executive Branch officers (save department heads)" (slip op. at 39) or all officials in the State Department responsible for arms control or Latin American affairs. Slip op. at 40.

mechanism is a very limited, constitutionally permissible solution to the recurring problems arising from the inherent conflicts of interest in Executive Branch investigations of the President and his closest advisors.

A. The Procedures for Appointing the Independent Counsel Are Constitutional

In enacting this legislation, Congress determined that the independent counsel is an "inferior Officer" within the meaning of the Constitution, H.R. Rep. No. 1307, 95th Cong., 2d Sess. at 5 (1978), and vested authority to appoint the independent counsel in the special division of the United States Court of Appeals for the District of Columbia Circuit. S. Rep. No. 170, 95th Cong., 1st Sess. at 3-4 (1977). This procedure is sanctioned by the express language of the Appointments Clause, which provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; *but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper*, in the President alone, *in the Courts of Law*, or in the Heads of Departments.

Art. II, § 2, cl. 2 (emphasis supplied).

Despite the express language of this provision, the panel majority held that Congressional authorization of court appointment of an independent counsel is unconstitutional on the grounds that (1) an independent counsel is not an "inferior Officer," and thus must be appointed by the President and confirmed by the Senate; and (2) the Constitution flatly prohibits interbranch appointments. Both grounds for this ruling are contrary to the Constitution and the precedents of this Court.

1. *This Court Should Defer to Congress' Judgment that the Independent Counsel Is an "Inferior Officer"*

The Appointments Clause divides the officers of the United States into two classes: (1) those who are expressly named in the Clause and must be appointed by the President subject to the advice and consent of the Senate, and (2) "inferior Officers" whose appointment Congress may entrust "as they [Congress] think proper" to the President, the courts, or the heads of departments. *See United States* v. *Germaine*, 99 U.S. 508, 509-10 (1878).

The Appointments Clause authorizes Congress to create all officers "by law" and to decide which of them should be classified as "inferior." The Framers made no attempt in the Appointments Clause exhaustively to catalog "inferior Officers," nor even to provide comprehensive definitions to govern classification. Instead, the Framers identified specific officers whose appointments required Presidential appointment with Senate confirmation and expressly left it to Congress to determine, with respect to officers other than those specified in the Clause, which branch should appoint them, including which additional ones should be appointed by the President with the advice and consent of the Senate. *United States* v. *Germaine*, 99 U.S. at 509-10. Thus, Congress' legislative classifications of officers under the Appointments Clause are entitled to deference not merely because all enactments of Congress are presumed to be constitutional, *see Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 n.9 (1983); *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), but especially because the Framers so clearly entrusted to Congress the discretion to classify officers as inferior and assign the responsibility of appointing them "as they think proper." *Ex parte Siebold*, 100 U.S. 371, 397-98 (1880).[11]

[11] In light of this express language of the Constitution, it is remarkable that the majority decision below pointedly declines to give *any* deference to the Congressional determination. Slip op. at 23, n.20.

The independent counsel is not one of the officers enumerated in the Appointments Clause, nor are the functions of the independent counsel similar in scope to any so named. Congress acted reasonably in classifying an independent counsel as an inferior officer. The authority and duties of an independent counsel are narrowly circumscribed. She may only investigate and prosecute a single, defined matter delineated by the court. She does not make administration "policy" and must abide by existing regulations and policies whenever possible. She is only appointed upon the request of the Attorney General, whose discretion in this regard is absolute and unreviewable. *Banzhaf* v. *Smith*, 737 F.2d 1167 (D.C. Cir. 1984); *cf. Dellums* v. *Smith*, 797 F.2d 817 (9th Cir. 1986). Throughout the independent counsel's tenure, the Attorney General may remove her for good cause. Any alleged abuses occurring during a grand jury investigation or criminal trial can be reviewed and remedied by the courts. Upon conclusion of the defined investigation, the office is terminated. This is hardly the type of major, long-lasting and broad authority of the specified officers —such as life-tenured Supreme Court Justices—that requires both Presidential appointment and Senate confirmation under the Appointments Clause.

This understanding of the Appointments Clause is consistent with the Framers' concerns that Congress not contravene separation of powers principles by arrogating power to itself at the expense of the Executive Branch. *Cf. Buckley*, 424 U.S. at 129 (1976). Congress has no power under the Clause to vest itself with appointment authority. To the contrary, by classifying an officer as "inferior," Congress necessarily diminishes its own power by permitting appointment without the Senate's advice and consent. Thus, Congress' considerable discretion pursuant to the Appointments Clause to classify officers poses no threat of Congressional aggrandizement at the expense of the Executive.

The appointment of an independent counsel will not impair the President's ability to enforce the criminal laws. Not only is the independent counsel's jurisdiction limited to one case, but even in that case, the Attorney General retains substantial authority to trigger the investigation as well as the appointment and removal of counsel; and, if the President believes that no prosecution is warranted, he, of course, retains the power to pardon.[12]

To be sure, the independent counsel wields full prosecutorial power as to the single investigation she is appointed to conduct. 28 U.S.C. § 594 (1982). This is no different, however, from the broad authority accorded to specially appointed prosecutors by the Executive Branch in similar circumstances. Such prosecutors have always been treated as "inferior" officers or mere employees whose appointments did not require the Senate's advice and consent. For example, the Watergate Special Prosecutor was authorized and appointed by the Attorney General to investigate and prosecute all Watergate-related offenses under an order of the Department of Justice precluding interference from the Attorney General. *See* 38 Fed. Reg. 30,738-39 (1973). Likewise, the "parallel" independent counsels, created by Department of Justice regulation, *see* 28 C.F.R. §§ 600.1-600.5 (1987), have duties identical to those of the independent counsel created by the Ethics in Government Act and are also guaranteed independence from Executive intrusion.[13] Yet,

[12] The unanimous court that upheld the constitutionality of the independent counsel provisions in *In re Olson*, 818 F.2d 34 (D.C. Cir. 1987) (per curiam) enumerated the many ways in which the "broad power and authority of the Attorney General are closely interwoven into the statutory scheme" of the Ethics in Government Act. Apart from his discretion to determine whether to appoint an independent counsel, he has, for example, authority to shape the independent counsel's jurisditcion by referring additional matters for her investigation, and the authority to intervene in certain aspects of the independent counsel's investigation, as, for instance, when wiretaps are involved. *Id.* at 45-46.

[13] Like the statutory office of the independent counsel created by Congress in the Ethics in Government Act of 1978, the parallel independent counsels are delegated all the investigative and prosecutorial functions of the Attorney General and Department of Justice with respect to matters within their jurisdiction, including the power to convene grand juries, to apply for immunity for witnesses and to commence and conduct prosecutions. 28 C.F.R. § 600.1(a). The parallel independent counsel's office continues until his investigation is complete, 28 C.F.R. § 600.3(b), and he may not be removed by the Attorney General except for cause. 28 C.F.R. § 600.3 (a)(1).

these parallel prosecutors are also appointed by the Attorney General, without the advice and consent of the Senate.[14]

In determining that independent counsel are "inferior Officers," Congress properly looked to the limited duties to be performed. By contrast, the court below ignored the limited role and focused exclusively on the appointment and removal mechanism. Such a "boot-strapping" analysis inevitably led to an erroneous conclusion. Thus, the only grounds cited by the court below for distinguishing the status of the statutory independent counsel from the Watergate special prosecutor and the Justice Department-appointed special counsel was that the latter could be removed at the whim of the Executive. Slip op. at 18, 19 & nn.16, 17.[15] Tellingly, the court below did not assert that the duties or functions of the stautory independent counsel were distinguishable from either the Watergate special prosecutor or the Justice Department-appointed special counsel. *See* slip op. at 18 n.16.

[14] Congress' classification of the independent counsel as an "inferior Officer" is also consistent with *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963). There, the court held that United States Attorneys, who wield much broader authority than independent counsel, are inferior officers who may be appointed, pursuant to Congressional authorization, by the courts on an interim basis.

[15] In any event, this argument was flatly rejected by this Court in *United States* v. *Nixon*, 418 U.S. 683 (1974), in which the Court unanimously held that the Executive did not have unfettered discretion to remove the Watergate special prosecutor. *Id.* at 694-96.

The panel majority reasoned that the independent counsel could not be an "inferior" officer because she is not subordinate to a specific "superior" officer. This conclusion is incorrect. Nothing in the Clause itself supports the court's conclusion that an inferior officer must be directly subordinate to another Executive officer. Moreover, the word "inferior," as it was commonly used at the time the Framers were drafting the Constitution, carried only a remote connotation of subordinacy.[16] It principally meant less exalted in rank, status and power. Congress was well within its discretion when it determined that an "inferior" officer need not have a "superior" to whom she is subservient.

The panel majority's interpretation also runs counter to this Court's ruling in *Ex parte Siebold*, 100 U.S. 371 (1880). In that case, this Court held that Congress, acting pursuant to the Appointments Clause, could vest the power to appoint election commissioners in the courts even though the election commissioners were not subordinate to any other officer. Yet, under the panel majority's rationale, these commissioners would not have been inferior officers, and their appointments by the court would have been impermissible.

In view of the considerations which underlay the actions of Congress, this Court should not find unconstitutional a statute which so clearly protects the public interest and which is so plainly authorized by the express terms of the Constitution. The interpretation adopted below requires reading into the Appointments Clause restrictions not found in its language. This Court should not permit such a strained revision of the constitutional language, particularly where the effect will be to give the Executive unchecked authority and produce a result con-

[16] *See* S. Johnson, *A Dictionary of the English Language in Which the Words Are Deduced from Their Originals* (1979 reprint of 1755 ed.) (defining "inferior," in order of preference, as lower in place, lower in station or rank of life, lower in value or excellency, and finally, subordinate).

trary to the overall objectives of the doctrine of separation of powers.

2. *It Is Not "Incongruous" for a Court To Appoint an Independent Counsel, an Officer of the Court, Performing Both Executive and Quasi-Judicial Functions*

The panel majority also held the appointment provision invalid on the ground that the Constitution absolutely prohibits interbranch appointments. Once again, the panel majority's conclusion failed to accord any deference to Congress' exercise of the express legislative power delegated to it by the Constitution to select, "as they think proper," the appointing authority, an exercise concurred in on three separate occasions by the President. Moreover, the ruling is contrary to decisions of this Court authorizing such "inter-branch" appointments by the Judiciary, provided there is not "*such incongruity* in the duty required as to excuse the courts from its performance." *Ex parte Siebold*, 100 U.S. at 398 (emphasis supplied) (upholding court appointment of election supervisors); *Rice* v. *Ames*, 180 U.S. 371, 378 (1901) (commissioners); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931) (commissioners who, *inter alia*, institute civil rights prosecutions).

In contrast to the panel majority's extremely unrealistic hypotheticals,[17] judicial appointments of independent counsel present no incongruity, because of the dual role that prosecutors serve as officers of the court, with responsibilities to both the Executive and the Judiciary.[18] This

[17] The panel majority hypothesizes a legislative parade of horribles, including legislation to allow courts to appoint State Department officials in charge of foreign policy. Nothing remotely like that case is now before the Court; should it ever arise, it will be time enough for the courts to apply *Siebold's* incongruity test and rule accordingly.

[18] *Newman* v. *United States*, 382 F.2d 479, 481 (D.C. Cir. 1967); *see also United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). The prosecutor is not merely an advocate, but an "administrator of justice." American Bar Association,

dual role is a time-honored concept. Indeed, the First Congress initially proposed to authorize the courts, not the Executive Branch, to appoint prosecutors. *See* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 108-09 (1923). While it was ultimately decided to place the appointment of prosecutors in the President, there is no indication that anyone suggested that the proposal to place such power in the courts was unconstitutional. Since several of the Framers served in the First Congress, *id.* at 57, the proposal to have courts appoint the prosecutors suggests that the Framers did not perceive any incongruity in judicial appointment of prosecutors. *Cf. Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983).

Because of the prosecutor's unique position in our system of justice, court appointments of prosecutors have been judicially and legislatively approved in a variety of contexts. In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987), for example, this Court upheld the Judiciary's inherent authority to appoint counsel to prosecute contempt proceedings when its orders are disobeyed, reasoning that the Judiciary should exercise its "inherent power of self-protection" and not depend upon the Executive Branch to redress disobedience. *Id.* at 2130-32, 2134. Likewise, in *United States* v. *Solomon*, 216 F. Supp. 835, 838-43 (S.D.N.Y. 1963), the court upheld a statute authorizing temporary court appointments to fill vacant United States Attorney positions. The court held that the statute did not violate the Appointments Clause, emphasizing that the appointments power is not intrinsically executive in nature. *Solomon*, 216 F. Supp. at 841-43. Federal courts also have statutory authority to select attorneys to perform in other capacities. For example, courts often appoint counsel to prose-

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Standards for Criminal Justice (1980), Commentary to Standard 3-1.1. He is "in a peculiar and very definite sense a servant of the law" insofar as his responsibility is not merely to win a case, but rather to ensure "that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

cute the claims of indigents. *See* 28 U.S.C. § 1915(d) (1982).[19]

The Judiciary's exercise of inherent supervisory powers over prosecutors[20] underscores the lack of incongruity in the court appointment of an independent counsel. The prosecutor is also obligated to observe the standards that courts have developed, adopted and enforced to govern prosecutorial conduct. Both the ABA Model Rules of Professional Conduct (1987), and the ABA Model Code of Professional Responsibility (1982), as amended, which the courts in various jurisdictions have adopted, stress the prosecutor's responsibility to the system of justice. The Model Code and the Model Rules forbid the prosecutor to go forward when his charges are not supported by probable cause, DR 7-103(A); Model Rule 3.8(a), and require him to cooperate with his adversary. DR 7-103(B); Model Rule 3.8(d). Additionally, the ABA Standards for Criminal Justice (1980) ("the ABA Standards") cover the full range of prosecutorial activity, including investigation, plea discussions, trial, and sentencing. These standards are routinely enforced by the courts in exercise of their supervisory powers over prosecutors to curb abuses threating the judicial system.[21]

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[19] *See McKeever* v. *Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982) (construing court's authority to request an attorney to represent an indigent under § 1915(d) as authority to appoint); *Whisenant* v. *Yuam*, 739 F.2d 160, 163-64 (4th Cir. 1984) (indigent plaintiff entitled to court-appointed counsel to prosecute civil rights claims against government officials); *see also White* v. *Walsh*, 649 F.2d 560, 563 (8th Cir. 1981) (*pro se* indigent plaintiff in civil rights action entitled to court-appointed counsel).

[20] *See United States* v. *Payner*, 447 U.S. 727 (1980); *see also United States* v. *Samango*, 607 F.2d 877, 884-85 (9th Cir. 1979); *United States* v. *Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972).

[21] *See, e.g., United States* v. *Bess*, 593 F.2d 749, 754-57 (6th Cir. 1979) (prosecutor's expression of his personal opinion of the defendant's guilt violated ABA Standards, warranting reversal of the defendant's conviction); *see also Lewis* v. *Lane*, 832 F.2d 1446, 1459 (7th Cir. 1987) (court ordered notification of state disciplinary authorities where assistant state's attorney and assistant

Finally, because the courts recognize that prosecutors perform quasi-judicial functions, the prosecutor enjoys absolute immunity from suit for his participation in the judicial process. *See Gray* v. *Bell*, 712 F.2d 490, 498 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Apton* v. *Wilson*, 506 F.2d 83, 93-94 (D.C. Cir 1974).

Thus, the prosecutor's role as an officer of the court with quasi-judicial functions demonstrates that there is nothing incongruous about the Congressional determination to empower a court to appoint an independent counsel.[22] This conclusion holds especially true because the Executive Branch has a potential conflict of interest in appointing an independent counsel. By vesting power to appoint the independent counsel in a court, Congress sought to avoid the "incongruity" arising when the Attorney General is called upon to investigate the President who appointed him or other top ranking officials with whom he has closely served. By contrast, the courts, which have experience both in appointing and supervising prosecutors and other counsel, are fully competent to

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attorney general withheld information from state courts and defense, violating Illinois analog to Model Code DR 7-103(B)); *United States* v. *Gold*, 470 F. Supp. 1336, 1351 (N.D. Ill. 1979) (dismissal of indictment ordered when grand jury witness acted as prosecutor, in violation of the ABA Standards); *United States* v. *Batchelor*, 484 F. Supp. 812, 813-14 (E.D. Pa. 1980) (prosecutor's interview of defendant without obtaining the consent of defendant's previous counsel violated the Model Code and warranted order for new trial).

[22] The nexus between the federal prosecutor and the federal judiciary is mirrored in state laws that permit the courts to appoint prosecutors in specific situations. *See, e.g., Ford* v. *State*, 4 Ark. App. 135, 628 S.W.2d 340, 341 (1982) (special prosecutor may be appointed by trial court where elected prosecutor is indicted for a criminal offense, pursuant to Ark. Stat. Ann. § 24-108 (Repl. 1962)); *Harceg* v. *Brown*, 512 F. Supp. 788, 791 (N.D. Ill. 1981) (when state's attorney is unable to attend a proceeding, "the court where said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding . . . ." (quoting Ill. Rev. Stat. ch. 14, para. 6 (1979)).

appoint an independent counsel and encounter no conflict of interest.

A court of law, specifically, the special division designated in the statute, is fully competent to appoint an independent counsel. The special division, like courts in general, has expertise in the administration of justice and has no conflict of interest. The independent counsel statute expressly provides that the judges of the special division may not sit in "any judicial proceeding concerning a matter which involves such independent counsel," except in the limited category of cases involving appointments made prior to 1987 relating to the counsel's removal by the Attorney General. 28 U.S.C. §§ 49(f), 596(a)(3) (1982). Thus, the statute avoids any "incongruity" that would be occasioned if judges were to sit on cases being handled by the prosecutor whom they had appointed.

A similar analysis disposes of the claim that an Article III court may not, consistent with separation of powers principles, determine the jurisdiction of the independent counsel pursuant to Section 592(d)(1). The authority to determine the scope of the independent counsel's jurisdiction is inherent in the Constitutional power to appoint counsel. In reviewing *ex parte* applications for wiretaps and search warrants, Article III courts are frequently called upon to make judgments concerning the nature and scope of federal criminal investigations. *See* 18 U.S.C. §§ 2516, 2518 (1982 & Supp. 1986) (requiring judicial approval of federal wiretaps); *United States* v. *Giordano*, 416 U.S. 505, 515 (1974) (citing with approval provision requiring judicial approval of wiretaps); *see also* Fed. R. Crim. P. 41 (judicial authority to issue search warrants); *United States* v. *Torres*, 751 F.2d 875 (7th Cir. 1984) (discussing judicial authority pursuant to Fed. R. Crim. P. 41). Just as the Executive is not in a position to appoint and supervise independent counsel, the Executive should not define the independent counsel's juriisdiction. As the Watergate experience clearly demonstrates, a thorough and fair investigation of high-level

wrongdoing can be frustrated by limiting the scope of a criminal investigation. *See supra* note 2. Given the practical, demonstrated problems from past experience, it would be "incongruous" to provide for the judicial appointment of a special prosecutor, but then to leave to the Attorney General or the President the task of demarcating the scope of her operations.

B. The Procedures for Removing the Independent Counsel Are Constitutional but Are Not Before the Court

The panel majority reached out to issues not before it to hold that the provisions for the removal of the independent counsel are unconstitutional. The removal provisions, requiring the Attorney General to have "good cause" and permitting judicial review, are not at issue in this case. No attempt has been made to remove appellant; thus, it is premature to consider these provisions.[23]

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[23] In *Bowsher* the Court considered the constitutionality of the removal provision even though it had not been invoked because the Comptroller General's "presumed desire to avoid removal by pleasing Congress" created a "here-and-now subservience to another branch that raises separation of powers problems." 106 S. Ct. at 3189 n.5 (quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)). Here, of course, the independent counsel cannot be removed by Congress nor by anyone but the Attorney General, and only by him for good cause or specified disabilities. Thus, the independent counsel removal provisions raise no issues of "here-and-now" subservience to a branch other than the Executive and are not ripe for review.

Moreover, when Congress reauthorized the independent counsel provisions in 1987, it amended the removal provisions to eliminate the principal deficiency that the panel majority perceived: namely, the judicial review standard that the court was to apply when reviewing the Attorney General's removal of an independent prosecutor. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1304 (1987). The court below asserted that this standard of review practically vested the removal power in the courts. While the panel majority was incorrect in its analysis of the prior review standard, the new legislation adopts an even more restrictive standard of review. Since the question was never properly before the court and has been obviated by the passage of new legislation, this Court need not, and should not, address it.

In the event this Court elects to address the removal provisions, it should hold them constitutional. The limitations on the Attorney General's removal authority are modest; they simply require that the Attorney General have "good cause" for removing the independent counsel and that the reviewing court, if its jurisdiction is invoked, be satisfied that the Attorney General has not made an error of law or fact. These provisions, unlike those invalidated in *Bowsher* and *Myers* v. *United States*, 272 U.S. 52 (1926), do not involve an attempt by Congress to aggrandize its powers to play a role in the removal of officers charged with performing nonlegislative functions.[24] The statute does not give Congress any role in the removal of an independent counsel.

It is this prospect of Congressional aggrandizement at the expense of the Executive that was the Framers' primary concern about the separation of powers[25] and that explains this Court's recent separation of powers decisions. The absence of that critical factor distinguishes those cases from this one. In *INS* v. *Chadha*, 462 U.S. 919, 959 (1983), and *Bowsher*, 106 S. Ct. at 3192, the Court invalidated statutes that reserved to Congress a role in executing the laws. By contrast, where Congress, without aggrandizing itself, has sought merely to protect individual appointees from Executive Branch influences that would deter the performance of their duties, this Court has upheld the statutes involved.

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[24] In *Myers*, Congress' invalid role was to veto removal of officers performing nonlegislative functions. 272 U.S. at 161. In *Bowsher*, Congress reserved to itself the power to remove the Comptroller General but impermissibly gave him executive, *i.e.*, nonlegislative, functions. 106 S. Ct. at 3188-89.

[25] *See Buckley*, 424 U.S. at 129 (1976) (emphasizing Framers' "fear that the Legislative Branch . . . will aggrandize itself at the expense of the other two branches").

In *Humphrey's Executor*, for example, the Court upheld provisions that restricted the President's authority to remove Federal Trade Commissioners. 295 U.S. at 628-29. The *Humphrey's Executor* Court distinguished *Myers*, 272 U.S. at 52, in which the Court had held unconstitutional a statute that prohibited the President from removing certain postmasters without the advice and consent of the Senate. 272 U.S. at 107, 176. The *Bowsher* Court reconciled the two cases by identifying the precise issue upon which the holding in *Myers* had turned: "congressional participation in the removal of executive officers is unconstitutional." 106 S. Ct. at 3188. *Bowsher* turned on the same crucial factor: "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the law except by impeachment." *Id.* Here, Congress has no power to remove the independent counsel.

The removal provisions here are consistent with those approved by this Court in other cases. Such limitations are valid when the Congress has properly vested appointment of an "inferior officer" in a department head or in the courts of law. *Myers*, 272 U.S. at 164. As a matter of constitutional structure and logic, it follows that, if Congress may authorize appointments by courts of law, then Congress may also place limitations on Presidential removal of inferior officers so appointed.

In *United States* v. *Perkins*, 116 U.S. 483 (1886), for example, the Court upheld the power of Congress to place limitations on the ability of the Secretary of the Navy to dismiss cadets he had appointed pursuant to Congressional authorization on the ground that such cadets were "inferior Officers" whose appointment and removal could be established by Congress. The Court stated: "[t]he constitutional authority in Congress to thus vest the appointment [of such inferior officers] implies authority to limit, restrict, and regulate the[ir] removal by such laws as Congress may enact in relation to the officers so appointed." *Id.* at 485. Thus, because Congress has validly vested the appointment of the independent counsel in the

courts of law, it may validly limit the removal of such counsel, including a requirement of "good cause" and judicial review.

Congress has clearly made the decision that, within the statutorily imposed system of check and balances, the independent counsel needs to operate without hindrance from the President. *Wiener*, 357 U.S. at 629. That judgment clearly is justified. The very purpose of the statute would be frustrated if the President could dismiss the independent counsel whenever the investigation threatened to lead to indictment or embarrassment of high-level Executive officials. It thus follows inescapably under this Court's precedents that the removal limitation is valid.

C. The Procedures Under Which the Independence Counsel Operates Are Constitutional

Finally, the majority below asserted as a basis for its holding the absence of ongoing Presidential supervision over the exercise of the independent counsel's discretion. No provision of the Constitution requires such supervision, nor is it mandated by general separation of powers principles.[26] Once it is established that the Congress may provide for appointment by a court of an independent counsel and may limit her removal by the President, then it follows that Congress may insulate the independent counsel from day-to-day supervision by the very individuals she is charged with investigating. To hold that the person investigated or his allies may control the operations of the investigator would defy experience and common sense.

The panel majority suggests that Presidential supervision is necessary to protect targets against abusive investigations by an overly zealous prosecutor. This is simply not the case. The subjects of an investigation or prosecution are well protected from the possibility of

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[26] *See, e.g., Kendall* v. *United States*, 12 Pet. 524, 610 (1838) (limiting Presidential supervision and control over postal employee).

abusive practices by an independent counsel. Although denominated "independent," the special counsel operates within a statutory framework of checks and balances that limit her discretion and ensure her accountability. For example, the Attorney General must make the initial finding of "sufficient" grounds to investigate criminality before an independent counsel may be appointed. The Attorney General may remove the counsel for "good cause." Further, the specific provisions of the Constitution protecting individuals, as well as the laws of the United States, also cabin the discretion of the prosecutor. The independent counsel is required to "comply with written or other established policies of the Department of Justice with respect to the enforcement of the criminal laws" except "where not possible." 28 U.S.C. § 594(f). Finally, as discussed above, all prosecutors, including the independent counsel, have a special quasi-judicial status as representatives of government and as officers of the court.[27] Thus, any prosecutor, including an independent counsel, is subject to the supervisory power of the courts.

The panel majority speculates that individuals' rights may nonetheless be injured by actions of the independent counsel. No such abuses have been alleged here. In fact, by putting eminent, experienced lawyers in charge of these investigations, the distinguished division of the Court of Appeals, appointed by the Chief Justice, has improved the likelihood of disinterestedness and fairness. Far from eroding the protection of individuals' rights, the independent counsel provisions protect the administration of justice from actual or perceived bias that "undermines judicial fairness" and "weakens public confidence in that fairness." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 42 (1950) (quoting *Administrative Manage-*

[27] *See Provision for Special Prosecutor: Hearings on H.R. 14476 et al. Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 65-69 (1976) (Memorandum of Professor Herbert S. Miller, consultant to ABA Special Committee).

ment in the Government of the United States, Report of the President's Committee on Administrative Management, 36-37 (1937)), *modified on other grounds*, 339 U.S. 908 (1950). As this Court recently reiterated, " '[J]ustise must satisfy the appearance of justice,' . . . and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite." *Young*, 107 S. Ct. at 2140 (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)). It hardly comports with the required "appearance of justice" to place daily supervision of the prosecutor in those whom he is charged to investigate or those who are close political allies of the investigation's target.

Any specific claims that the independent counsel has acted improperly are appropriately directed to the courts that regularly review properly presented claims of prosecutorial misconduct. The panel majority's speculation that litigants may be chilled from raising such claims for fear of reprisal for impugning a court appointee is unfounded. The special division is barred from participating in any such proceeding. 28 U.S.C. § 49(f). Thus, any allegation of prosecutorial misconduct would be heard not by the appointing court, but by a district court supervising the proceeding with review in the appropriate Court of Appeals. If court appointments of counsel of all types were halted on the basis of a mere possibility that challenges to court appointees' actions would be chilled, our system of criminal justice could hardly exist.

Much of the panel majority's reasoning amounts to an argument that the independent counsel provisions are bad policy. For example, the panel majority speculated that the independent counsel might develop powerful institutional incentives to pursue investigations and bring indictments to preserve their own functions. These policy concerns have not been borne out by experience with independent counsel appointments. Since 1978, the Department of Justice has reported at least thirty-six instances triggering the independent counsel provisions. Twenty-five of these matters were closed without a preliminary investigation and in eight of the remaining eleven in-

dependent counsel were appointed. S. Rep. No. 123, 100th Cong., 1st Sess. 6-7 (1987). Of the eight independent counsel, the first four terminated their offices after making determinations that no prosecution was warranted. Wash. Post, Jan. 24, 1988, at A8, col. 1. More recently, independent counsel have obtained indictments and convictions against two covered officials. Wash. Post, Feb. 23, 1988, at A22, col. 1. This record hardly suggests the work of a self-interested bureaucracy intent upon perpetuating itself.

In any event, such policy judgments are not for the Judiciary to make. That is the province of the Congress, and the Congress has definitively endorsed the independent counsel mechanism by enacting the law in 1978 and reenacting it in 1983 and 1987,[28] each time by overwhelming margins. The Congress' endorsement bespeaks public confidence in and support for both the concept and the operation of an independent mechanism to investigate and prosecute wrongdoing at high levels in the Executive Branch. Further, two Presidents have eschewed the veto, three times signed the legislation and repeatedly invoked it without public controversy over the last decade. The panel majority's policy arguments are inappropriate and unfounded.

In sum, the availability of the judicial process and the statutory limitations on the operations of the independent counsel are more than adequate to handle the remote possibility of abuse by independent counsel and to protect the rights of the targets of independent counsel investigations. The statute is also likely to prevent a proven abuse that the panel majority seems to ignore but was of principal concern to the Congress—the undue benefits and leniency these individuals might receive if investigated by their political friends and allies.

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[28] Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987).

CONCLUSION

Far from undermining the checks and balances of the constitutional system, the independent counsel provisions under review serve as a needed counterweight to the unfettered ability of the President and the Attorney General to investigate and resolve serious criminal allegations against their closest political appointees. The provisions do so in a limited manner which does not enhance Congressional power, but that does enhance public confidence in the administration of justice.

The authority of Congress to enact the independent counsel statute is firmly anchored in the explicit language of the Constitution. Substantial deference is owed to Congress' judgment about how best to solve clearly established problems of government, particularly when it is not seeking to aggrandize its own power. Accordingly, appellees' challenges fail to satisfy the heavy burden of demonstrating that this statute is beyond the constitutional authority vested in Congress.

For the reasons stated above, the American Bar Association as *amicus curiae* respectfully requests this Court to reverse the Court of Appeals' ruling and hold that the independent counsel provisions of the Ethics in Government Act of 1978 are constitutional.

Respectfully submitted,

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Dated: March 9, 1988

No. 87-1279

Supreme Court, U.S.
FILED
APR 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant

v.

THEODORE B. OLSON, *et al.*

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR EDWARD H. LEVI, GRIFFIN B. BELL, AND WILLIAM FRENCH SMITH AS AMICI CURIAE IN SUPPORT OF APPELLEES

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF THE AMICI CURIAE

This case concerns the constitutionality of the Independent Counsel provisions of the Ethics in Government Act. The amici are former Attorneys General of the United States, who presided over the Department of Justice, respectively, at the time when an Independent Counsel statute similar to the current provisions was first considered by Congress; at the time when the predecessor of the current provisions was first enacted; and at a time when the Independent Counsel provisions were frequently invoked. Accordingly, the amici are acquainted with the practical effects of the Independent Counsel provisions on the operations of the Executive Branch, and they have a continuing interest in the questions presented in this case.[1]

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

When the Framers designed the separation of powers, they determined that no official would exercise power unless subject to an institutional check. On the most practical level, the Independent Counsel provisions are inconsistent with this determination. The extraordinary isolation of the Independent Counsel from the Executive Branch, in our judgment, creates the potential of both a significant disruption of the Executive Branch and a threat to individual liberty.

A. Every criminal prosecutor exercises great power over the individuals involved. In addition, a criminal prosecution can affect other important government interests. Because most prosecutorial decisions cannot be reviewed by a court, the principal checks on the prosecutor are those supplied by the Executive Branch itself. The Independent Counsel provisions effectively isolate the Independent Counsel from the Executive Branch, thereby leaving the Independent Counsel free from institutional restraints throughout much of her task—precisely the condition that the Framers sought to avoid.

B. An Executive Branch prosecutor operates within a network of intra-Branch checks and balances. Because a prosecutor within the Executive Branch must accommodate the competing priorities and responsibilities of the Branch, he or she will sometimes have to subordinate a particular prosecution to the government's interest in pursuing other prosecutions, to the government's long-term interest in the development of the criminal law, or to the interests of other Departments in the Executive Branch.

These internal checks and balances are the direct result of the Framers' decision to establish a unitary Executive Branch. They function precisely as the Framers intended the system of checks and balances to function: they prevent a prosecutor from being overtaken by an excess of zeal or ambition, or by the loss of perspective caused by too narrow a focus on one case.

The Independent Counsel is isolated from the Executive Branch; consequently, these internal checks and balances are absent in her case. Not only does this potentially endanger the liberties of the individuals subject to investigation; in addition, it disrupts the operations of the Executive Branch by preventing effective coordination between those involved in the investigation of high government officials and those responsible for the many other important functions of the government.

C. Contrary to the suggestion of appellant and her supporting amici, the Independent Counsel provisions do not provide for the effective control of the Independent Counsel by the Attorney General in ways that would avert these dangers. By the same token, however, Congress can, if it wishes, invoke alternative devices, provided by the Constitution, that ensure the independence of a prosecution from improper influence without compromising the values that the separation of powers is designed to serve.

ARGUMENT

THE INDEPENDENT COUNSEL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT ARE INCONSISTENT WITH THE CONSTITUTIONAL SEPARATION OF POWERS.

This case presents the question whether the Independent Counsel provisions of the Ethics in Government Act, 28 U.S.C. 49, 591 *et seq.*, violate various Clauses of the Constitution relating to the separation of powers. The Court has, in the past, not hesitated to resolve such questions on the basis of the clear limits established by the Constitution. See, *e.g.*, *Bowsher v. Synar*, 106 S.Ct. 3181 (1986); *INS v. Chadha*, 462 U.S. 919 (1983). In this case, as well, the Appointments Clause and other provisions may provide a clear answer to the questions presented. But when the Court determines that the clear commands of the Constitution are not dispositive, it resolves such separation of powers issues in light of practical realities—in this case, the practical realities of how the Independent Counsel provisions operate. "The men

who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

To the extent the Court's resolution of the questions presented here is informed by such practical considerations, the issues in this case are, therefore, whether the Independent Counsel provisions are "unduly disruptive of the Executive Branch" (*Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977); see, *e.g.*, *Buckley*, 424 U.S. at 122) and whether those provisions weaken the constitutional system of checks and balances in a way that jeopardizes the rights of individuals. It is our judgment that the extraordinary isolation of the Independent Counsel from the Executive Branch creates the potential of both a significant disruption of the Executive Branch and a threat to individual liberty.

A. Introduction

When the Framers designed the separation of powers, they were not concerned principally with venality or rank favoritism. They were instead concerned with excesses of what might otherwise be admirable qualities, such as ambition and zeal. The remedy they prescribed was to ensure that no government official would have free rein in the exercise of power. Every official was to be held in check by another official or another branch of government that had a different constituency and different priorities.[2] In this way, "ambition [would] be made to counteract ambition" (*The Federalist* No. 51 (Madison) at 322 (C. Rossiter ed. 1961)) and the natural tendencies of those who held power—tendencies that would be dangerous if left unchecked and unbalanced—could instead be harnessed for the common good. See *The Federalist* No. 51 (Madison); see also *id.*, No. 10 (Madison) at 78-84; *id.*, No. 15 (Hamilton) at 111; *id.*, No. 48 (Madison) at 309; *id.*, No. 72 (Hamilton) at 436-440.

[2] See, e.g., *The Federalist* No. 51 (Madison) at 322 (C. Rossiter ed. 1961): "[T]he constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other —that the private interest of each individual may be a sentinel over the public rights."

Nowhere in government are these checks and balances more imperative than in the conduct of a criminal investigation. The ultimate checks on the power of the prosecutor are, of course, the authority of the court to dismiss a prosecution, and the authority of the jury to acquit. But as this Court has often recognized, the prosecutor exercises great power in ways that are not, and properly cannot be, subject to judicial control. See, *e.g.*, *Young v. United States ex rel. Vuitton et Fils*, 107 S. Ct. 2124, 2137 (1987).

In particular, throughout a criminal investigation, the prosecutor must make many significant decisions that cannot be effectively reviewed by a court but that have a dramatic impact on the lives of individuals. The prosecutor must determine, for example, when to seek a search warrant; when to seek to engage in electronic surveillance; when to subpoena documents; when to call witnesses before a grand jury; whom to immunize; and whom to threaten with prosecution. Each of these decisions is but one of many that a prosecutor will make. But for the individual whose privacy is invaded, whose affairs are disrupted, and who is subjected to extraordinary emotional distress, these are likely to be the most significant decisions that any government official ever makes.

The prosecutor must also decide on the public statements that are to be made during the course of the investigation. Especially in a case involving a high government official, the pressure to make such statements will be great. A prosecutor's public statements can have a profound impact on an individual's reputation. Moreover, the harm that an alleged suspect suffers from such publicity will often persist no matter how completely the individual is exonerated.

Then the prosecutor must decide how long to continue the investigation. Often an investigation will not conclusively determine the guilt or innocence of an individual, and the prosecutor can always find ways to invest more resources and seek more evidence. Finally, of course, the prosecutor must decide whether to seek an indictment.

These decisions, too, can impose enormous burdens on entirely innocent individuals. As Justice Jackson, then Attorney General, stated: "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."[3] A person who is the target of a prolonged investigation before being exonerated, or a defendant who prevails at trial, is subject to financial, emotional, and reputational burdens that few members of our society are ever required to endure. "Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young*, 107 S. Ct. at 2141.

Of necessity, however, these decisions cannot be subject to an effective judicial check. That is because, as the Court has often recognized, nearly all of the many decisions that a prosecutor makes are highly discretionary. They require the exercise of judgment on the basis of many complex factors, and they cannot be reduced to a formula or an objective standard of the kind that courts can apply. See, *e.g.*, *Wayte v. United States*, 470 U.S. 598, 607-608 (1985); *Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985). Courts cannot review these prosecutorial decisions, and they have properly refrained from doing so.

Nor, of course, can prosecutorial decisions properly be subject to a check by Congress. Congress cannot be, and ought not be, concerned with the details of particular

[3] *The Federal Prosecutor*, Address delivered at the Second Annual Conference of United States Attorneys, April 1, 1940, at 2. We have reprinted a copy of this address as an appendix to this brief.

cases, especially particular criminal prosecutions. As the Framers recognized when they adopted the Bill of Attainder Clause, congressional concern with specific allegations and specific defendants is a prime potential source of serious abuse.

It follows that the only practical, realistic check on a prosecutor's power—a power comparable to that exercised by few others in our system—is the Executive Branch itself. At bottom, the choice is between, on the one hand, allowing a prosecutor to wield great power essentially unchecked; and, on the other hand, subjecting the prosecutor, in some degree, to the internal controls of the Executive Branch and the President's ultimate accountability to the people as a whole. There can be little doubt that the Framers, who well understood the danger of unchecked, discretionary law enforcement power, would choose the latter course.

Another dimension of the problem is equally important. A criminal prosecution does not just affect the interests of the individuals who are subject to it; it affects the interests of the Executive Branch as a whole. A mishandled prosecution can "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions" (*Nixon v. Administrator*, 433 U.S. at 443). It can disrupt the government's overall law enforcement priorities and jeopardize other law enforcement efforts; it can also interfere with Executive Branch responsibilities outside the area of law enforcement, including the President's responsibility for national security and foreign affairs.

It would be folly to entrust an enterprise that is so sensitive and so difficult to a single individual who comes new to the task, who is essentially free of all supervision, and who has no institutional connection to the officials responsible for the many other constitutional responsibilities of the Executive Branch. It would be even worse to place such an individual in a position that

creates artificial incentives to prosecute a target with unusual zeal. But that is, in essence, what the Independent Counsel provisions do.

Some of those present at the Constitutional Convention argued against centralizing executive power under a single President; Mr. Randolph, for example, urged that in order to preserve "independence," the execution of the law should be entrusted not to a single President but to three individuals. I Farrand, The Records of the Federal Convention of 1787 at 66 (rev. ed. 1937). But the Framers rejected those arguments. Instead, they accepted James Wilson's view that unifying executive power, far from being a threat to liberty and good government, "would be the best safeguard against tyranny." *Ibid.* On the most practical level, the operation of the Independent Counsel provisions bears out the wisdom of the Framers' decision.

B. The Insulation of the Independent Counsel Disrupts the Executive Branch and Creates a Potential Threat to Individual Liberty.

In numerous ways, the isolation of the Independent Counsel threatens both individual liberty and the integrity of the Executive Branch.

1. a. A prosecutor in the Department of Justice operates within a network of internal—intra-Department and intra-Executive Branch—checks and balances. First, of course, every Department of Justice prosecutor must answer to a superior: an Assistant United States Attorney to the United States Attorney; the United States Attorney to the Attorney General; the Attorney General, ultimately, to the President. But on the day-to-day level, other, less formal, checks and balances are also very important. For example, in the course of an investigation or prosecution, a Department of Justice prosecutor must routinely take into account the interests of other prosecutors, of law enforcement officials, and of officials outside of the Department. A prosecutor will often have to

accommodate or subordinate the pursuit of a particular prosecution to these competing interests.

For example, United States Attorneys are responsible for all federal criminal prosecutions (and, for that matter, all federal civil litigation) within their District—not just for one case and one or a few defendants. Thus, the pursuit of any one prosecution will have to be accommodated to the other priorities of the office. Similarly, a Department of Justice prosecutor may have to abandon an effort to press for an expansive interpretation of a federal criminal statute because that effort conflicts with what the Criminal Division of the Department of Justice, or the Solicitor General's Office, sees as the broader long-term interests of the federal government. In addition, a Department of Justice prosecutor may have to subordinate the interest in pursuing a criminal prosecution to the interests of agencies outside the area of law enforcement. For example, a criminal investigation may have to be shaped in a certain way, abandoned, or not pursued in the first place because it implicates important concerns in the areas of foreign affairs and national security.

These internal checks and balances are the direct result of the fact that a Department of Justice prosecutor operates within the Executive Branch. Because of the diverse responsibilities of the Executive Branch, the prosecutor must constantly establish and reassess priorities. Neither the prosecutorial function nor any single prosecution can grow too large. If it threatens to, the competing priorities of the Executive Branch will assert themselves.

In this way, the checks and balances we have described serve the very role that the Framers envisioned for the system of checks and balances: they force a prosecutor to consider different perspectives and to accommodate competing interests. They guard against the dangers that are endemic in any government—not the dangers of cor-

ruption or gross abuse, which are rare, but the everyday danger that a prosecutor will become too close to a case and will lose perspective The most admirable and dedicated prosecutor may exaggerate the importance of a case and underestimate its potential to interfere with other important government interests and with the lives of the individuals affected. Indeed, the danger may be particularly great in the case of the most dedicated prosecutors.

Because of the intra-Executive Branch controls to which Department of Justice prosecutors are subject, any such prosecutor will soon be brought up short by a law enforcement agent who does not share the same zeal and who has other responsibilities; by an official of another Executive Branch Department who can appeal to higher authority if the prosecutor does not give sufficient weight to that Department's interests; by another prosecutor who objects to the diversion of resources from other prosecutions; by another Department of Justice official who recognizes that single-minded focus on one case can jeopardize the government's long-term interest in the development of the law; by a supervisor who will point out the prosecutor's excesses; or just by the need to move on to another case on an overcrowded docket.

b. These institutional restraints are absent in the case of the Independent Counsel. The Independent Counsel has no day-to-day supervisor and, as we will discuss below, the Attorney General's (and therefore the President's) authority over her is extremely limited. Consequently, the Independent Counsel is not accountable to any official who has responsibility for a broad range of Executive Branch operations.

In addition, unlike a United States Attorney, who has responsibility for an entire federal district, the Independent Counsel has responsibility for only a single matter. Every attorney in the Office of the Independent Counsel is engaged in some way in the prosecution of the

same, single case. Moreover, the Independent Counsel provisions specify that the Department of Justice "shall," upon request, provide the Independent Counsel with "the resources and personnel necessary to perform such independent counsel's duties." 28 U.S.C. 594(d). Thus, the Independent Counsel can requisition a team of law enforcement officers who have no competing responsibilities. In all of these ways, the Independent Counsel essentially escapes the condition that shapes the environment of every other prosecutor—the need to determine and reassess priorities in a setting characterized by competing interests and demands.

The result is the institutionalization of the single-minded prosecutor. Our concern is not that an Independent Counsel will maliciously embark on a personal vendetta or will deliberately engage in gross misconduct. The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel—specifically, her isolation from the Executive Branch and the internal checks and balances it supplies—is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests.

2. Unlike the Department of Justice, the Office of Independent Counsel lacks what is often called an institutional memory. It has no stock of knowledge of previous criminal prosecutors with which to compare the matter assigned to it. Such an institutional memory is an invaluable asset in making a sound judgment about the effects of a prosecutorial decision on both individuals and other government interests.

We noted above that in the course of an investigation and prosecution, a prosecutor makes many discretionary decisions that can have a powerful effect on both the individuals caught up in the investigation and the gov-

ernment's long-term law enforcement interests. The officials responsible for a prosecution must decide, for example, whether they have crossed the line that separates thoroughness from the unfair pursuit of an individual. They must also decide such questions as whether they are using a particular tactic so aggressively, or are seeking such a strained interpretation of a statute, that they are likely to create an unfavorable precedent that permanently hampers criminal law enforcement. In making these decisions, formal rules or guidelines are little help; such decisions must be made on the basis of the kind of wisdom and judgment that come from extensive practical experience.

In this respect, no single prosecutor can rival the accumulated wisdom and experience found in a diverse, ongoing institution. In such an institution, the whole is, in a sense, greater than the sum of its parts. An attorney who has, for example, spent a career reviewing applications for search warrants, or determining whether the government should seek review of adverse judicial decisions on issues of criminal procedure, has developed expertise and judgment that literally cannot be matched in any other way. More generally, no matter what issue arises in the course of a prosecution, there is a good likelihood that someone in the Department of Justice will have dealt with something like it at some time in the past.

The Executive Branch is structured precisely so as to take advantage of these institutional assets. That is why the Executive Branch has an internal hierarchy, mechanisms of internal review and scrutiny, and requirements of cooperation and coordination. For example, prosecutors are required to consult with other officials or to obtain permission before engaging in certain actions—such as certain means of gathering evidence, indictment under certain statutes, or any appeal of an adverse decision—

that might substantially affect individual rights or the government's long-term interests.[4]

Because the Office of Independent Counsel is cut off from the Executive Branch, it wholly lacks these important institutional advantages. Not only does the Office —an ad hoc, temporary institution—not have the institutional memory of the Department of Justice; it has no structure for taking advantage of the institutional assets that are within the Department of Justice or the Executive Branch. The Independent Counsel is, in general, not required to consult with, or seek approval of, anyone within the Department before taking a significant prosecutorial action.[5] Officials in the Department have no institutional means of keeping abreast of developments in the investigation conducted by the Independent Counsel. There are no institutionalized networks for coordination between the Office of Independent Counsel and attorneys in the Department of Justice.

The institutional advantages of the Department of Justice are especially pronounced in cases involving high government officials. These investigations present unusual problems. On the one hand, such officials should be held to a high standard of responsibility, and it is especially

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[4] See, *e.g.*, United States Attorney's Manual § 9-2.132 (enumerating statutes under which a United States Attorney may not institute a prosecution without the express authorization of the Criminal Division); *id.* § 9-2.133 (enumerating statutes under which a United States Attorney may not convene a grand jury or seek an indictment without consultation with the Criminal Division); *id.* § 9-2.161 (Attorney General's approval generally required for issuing subpoena to member of news media); *id.* § 9-2.171 (decision whether to seek review of adverse judicial decision is reserved to the Solicitor General).

[5] 28 U.S.C. 594(a) does provide that the Attorney General retains control of "those matters that specifically require the Attorney General's personal action under [18 U.S.C.] 2516," a provision regulating certain forms of electronic surveillance. This is, of course, a very narrow exception.

important that public confidence in government not be impaired. But on the other hand, cases involving high government officials can create threats to other government interests that are seldom seen in routine criminal prosecutions. Moreover, such cases can raise difficult questions about the distinction between violations of the law and legitimate governmental activity. And such cases can become focal points for intense political pressure.

The Department of Justice undoubtedly has more extensive experience in the prosecution of allegedly corrupt federal and local officials, in a politically charged atmosphere, than any other institution. The accumulated wisdom and experience of the Department of Justice is a unique asset to a prosecutor engaged in such an investigation.

An ad hoc institution like the Office of Independent Counsel will, by contrast, be confronting every one of these vexing issues for the first time, and it is likely to find itself at sea in dealing with them. It will not have developed institutionalized ways of dealing with political pressure from Congress and other sources. It will not know what weight to attach to, for example, claims of diplomatic immunity or assertions that a particular investigative measure will interfere with national security. It will not know how to assess an official's claim that what might appear to be criminal activity was in fact the vigorous performance of the duties of a public office. Issues like that arise frequently, of course, in investigations of the kind that now must be assigned to an Independent Counsel.

3. a. One of the important functions of the Department of Justice is to provide a counterweight to government agencies that pursue a single programmatic mission. Agencies charged with a specific mission—whether that mission is enforcing the securities laws, reducing expenditures on social welfare programs, or any of the scores of other tasks in which government agencies engage

—develop a certain unity of outlook. They tend to view their mission as highly important, and to be less sensitive than an outsider might be to the arguments of those who oppose their efforts. Such a unity of outlook and sense of mission should not be derided; they are an important part of establishing a sense of vigor and esprit in an agency, and they often lead to the faithful implementation of the legislature's intentions for a program. But in certain contexts these characteristics can also cause the most able and dedicated agency—if it is unchecked by an agency with a broader outlook—to commit damaging errors.

Thus, a central virtue of the role of the Department of Justice as the principal representative of the United States in litigation is that it enables the Department to correct the biases of single-mission agencies. Department of Justice attorneys often require other government agencies to moderate their positions in order to avoid wasteful and unnecessary litigation. Perhaps the most dramatic example is the one of most direct concern to this Court: every year, federal agencies with a more narrow mission ask the Solicitor General to seek review in this Court of hundreds of adverse judgments; the Solicitor General, with his broader perspective, seeks review in only a fraction of those cases.

This aspect of the Department's operations exemplifies the way in which the unitary Executive Branch functions. Under the unitary Executive established by the Framers, no agency with a narrow mission can pursue its policies without restraint. All of them must submit to the authority of higher officials who take a broader view —and ultimately to the authority of the President, who, as the single person elected by the nation as a whole, has the broadest view.

b. The Office of Independent Counsel is the quintessential single-mission agency. But until it brings an indictment and forces a defendant to withstand a trial, it is not subject to any review by an official or agency with

a broader perspective. Moreover, the Office of Independent Counsel is a single-mission agency in an area—highly publicized, politically charged criminal prosecutions—where such an agency is least appropriate.

The single-mission nature of the Office of Independent Counsel derives from several sources. The Office is brought together on a temporary basis for one task—to pursue one or a few alleged suspects. Its sense of mission is bound to be heightened by the fact that it operates in the most adversarial context known to our law. In addition, during the crucial investigative stages of the case, it operates essentially on an ex parte basis: it seldom, if ever, goes before an impartial judge who will require it to consider the point of view of the other side. In these circumstances, it would be entirely natural for the Independent Counsel to lose perspective and exaggerate the importance of its mission. And when it does so, there are no countervailing forces—no superior, no competing law enforcement interests, no other Executive Branch Departments—available to correct it.

The temporary nature of the Office of Independent Counsel exacerbates this problem in two important respects. First, it ensures that the investigations conducted by the Independent Counsel will be highly publicized. An ongoing component of the Executive Branch can add another investigation to its docket without attracting public attention. The Independent Counsel provisions theoretically permit the appointment of an Independent Counsel without notice to the public (28 U.S.C. 593(b)), but as a practical matter it is simply impossible to establish an entire investigative office, with a new supervisor and a new staff, to investigate a high government official, without attracting enormous public attention. Thus, the separation of the Independent Counsel from the Executive Branch necessarily casts aside one of the most decent traditions of our criminal law system—the tradition that

allegations of wrongdoing are not made public until a grand jury has found probable cause to believe them true.

Second, the temporary nature of the Independent Counsel's position skews the incentives of those who hold that office. In an ongoing, multi-function institution like the Department of Justice, no individual's career is likely to depend entirely on a single assignment. However a particular case is concluded, there will always be another matter waiting. The Independent Counsel, by contrast, has no such diversity of incentives. Her government career consists of one very highly-publicized case, probably with political overtones.

It would be surprising if that institutional arrangement did not skew the Independent Counsel's incentives. She has every reason to pursue an investigation with undue thoroughness; she has no comparable incentive to err on the side of terminating an investigation quickly. She has an incentive to seek an indictment and bring an individual to trial, instead of risking public condemnation for dropping a politically popular charge. We do not question the ability of the individuals who have served as Independent Counsel. But "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher*, 106 S. Ct. at 3191. The effect of the Independent Counsel's institutional position on her incentives therefore cannot be overlooked.

4. Finally, because of her isolation from the Executive Branch, the Independent Counsel is cut off from Executive Branch officials who might alert her to the danger that she is damaging other important government interests. The prosecution of criminal cases is, of course, only one of the responsibilities of the Executive Branch. Experience has shown that allegations of criminal wrongdoing by high Executive Branch officials often arise out of actions they took while attempting to discharge these other Executive Branch responsibilities.

Because the jurisdiction of the Independent Counsel is confined principally to high government officials, the Independent Counsel's operations can be expected to impinge on the other interests and responsibilities of the Executive Branch in a significant percentage of cases. But the Independent Counsel, unlike the Department of Justice, has no institutional means of taking these interests into account. Because it is a temporary, ad hoc institution that is isolated from the Executive Branch, the Office of Independent Counsel has no established relationships, formal or informal, with any Executive Branch Department, and it is likely to have deficient knowledge of their operations.

For example, it is not always apparent when, in the course of a complex criminal investigation, an issue has arisen that implicates the interests of other Departments. Because of its experience and its institutional ties to other Departments, the Department of Justice is equipped to recognize such issues; the Office of Independent Counsel is not. Once such an issue has been identified, the Department of Justice has developed means of bringing other Departments into its deliberations in a way that permits the various interests to be compromised and accommodated without confrontation. The Office of Independent Counsel has no opportunity to devolp such mechanisms. Moreover, the Department of Justice has experience in weighing the interests that other Departments assert. Because of its ongoing, institutional role in the Executive Branch, it will have a sense of when the claims of other Departments are exaggerated and when they are entitled to deference. The Office of Independent Counsel, with its one-time, exclusively prosecutorial mission, is unlikely to develop this capacity.

These institutional differences between the Department of Justice and the Office of Independent Counsel are especially pronounced, and especially troublesome, in connection with questions concerning national security and foreign affairs. Because of the importance and ubiquity

of such questions in the government today, they will arise with some frequency in matters referred to the Independent Counsel. These questions are specialized and sensitive, and it is often difficult to resolve the competing claims.

Officials who are primarily concerned with national security and diplomacy have a sharply different orientation from prosecutors. Such officials often do not share the perspective that so strongly emphasizes the importance of law enforcement and the pursuit of alleged wrongdoers. Prosecutors, on the other hand, are not schooled in the nuances of relations among nations. They are likely to discount the long-term and remote consequences in which the Departments of State and Defense must deal. Prosecutors may not fully understand, for example, the extent to which a nation must not permit certain matters to be publicized in the way that a criminal investigation would inevitably publicize them.

The Executive Branch has institutional ways of resolving issues that arise in such cases. It has institutional arrangements, formal and informal, for discussions at various bureaucratic levels and ultimately mediation by the Cffice of the President if necessary. The Independent Counsel has nothing comparable. Its resolution of these issues is therefore likely to be far less well-informed, and far more confrontational.

The Framers assigned to the President the responsibility to take care that the laws be faithfully executed. They of course intended that *all* the laws be faithfully executed. Whatever the theoretical rationale of the Independent Counsel provisions, their practical effect is to single out one Executive Branch function—the prosecution of certain high officials—and to give that function a priority. That task alone is insulated from other, potentially competing interests that the President is charged with protecting. In this way, the Independent Counsel

provisions, on the most practical level, undermine the Framers' design.

C. The Limited Statutory Provisions for Control of the Independent Counsel Do Not Alleviate These Problems.

Appellant and her supporting amici contend that—notwithstanding the principle of the Independent Counsel provisions (and indeed appellant's title)—the Independtant Counsel is in fact not independent of the internal controls of the Department of Justice. In effect, their contention is that the Independent Counsel is independent only in desirable ways, not in ways that interfere with the interests that the Framers sought to protect when they decided upon a unitary Executive Branch. Not surprisingly, this Panglossian view is incorrect. Appellant's arguments do not take into account the realities of the administration of the Independent Counsel provisions.

1. Appellant relies first on 28 U.S.C. 592, which governs the Attorney General's role in the appointment of the Independent Counsel. Appellant asserts that the Attorney General retains "complete power over the initiation of the statutory process" (Br. 19).

This assertion is simply mistaken. The Independent Counsel provisions impose tight controls on the Attorney General's discretion. Indeed, that is part of their very purpose.[6] Far from retaining complete control, the Attorney General has a mandatory duty to seek the appointment of an Independent Counsel in certain circumstances. See 28 U.S.C. 592(c). Courts of appeals have held that the Attorney General's decision not to seek the appoint-

[6] Notably, another provision, 28 U.S.C. 591(c), provides the Attorney General with an option to seek the appointment of an Independent Counsel in certain circumstances. This is further confirmation of a point that is in any event clear from the language of the statute—that the provision under which appellant was appointed, 28 U.S.C. 592, is not optional but imposes a duty on the Attorney General.

ment is not subject to judicial review;[7] but it remains a legal duty, and it goes without saying that Attorneys General have taken it very seriously.

This mandatory duty arises unless the Attorney General determines, on the basis of a "preliminary investigation," that there are not even "reasonable grounds to believe that further investigation or prosecution is warranted" in a particular case. 28 U.S.C. 592(b)(1), (c)(1). The Attorney General must make this determination after an extremely brief and superficial investigation. The statute requires the Attorney General to make the determination within 90 days after receiving the information that triggers the preliminary investigation (28 U.S.C. 592(a)(1)), and it specifically disables the Attorney General from using many of the tools that any prosecutor would use to get to the truth of a matter: he is denied authority to "convene grand juries, plea bargain, grant immunity, or issue subpoenas" (28 U.S.C. 592(a)(2)). Thus, unless the Attorney General can determine, after a brief and superficial investigation, that there are not even "reasonable grounds [for] . . . further investigation," he must seek the appointment of an Independent Counsel.

This scheme gives the Attorney General little real control over the decision whether to initiate an investigation by the Independent Counsel. The Attorney General will be able to identify patently frivolous allegations. There is, however, a very substantial class of allegations that cannot be dismissed without a significant degree of investigation but that turn out to be utterly meritless. In those cases the Attorney General is, in practical effect, deprived of all control over the prosecutorial process. He must seek the appointment of an Independent Counsel, and the entire Independent Counsel apparatus will be brought to bear on one defendant.

[7] *Dellums v. Smith*, 797 F.2d 817, 818 (9th Cir. 1986); *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984).

2. Appellant also relies on 28 U.S.C. 594(f), which provides that the Independent Counsel "shall, except where not possible, comply with written or other established policies of the Department of Justice respecting enforcement of the criminal laws." Appellant suggests (Br. 19-20) that this provision ensures that an Independent Counsel's investigation will be little different from what a Department of Justice investigation, free of political influence, would have been.

This contention is erroneous on two levels. First, it falsely assumes that a criminal investigation is shaped by formal rules written out in manuals. The crucial judgments that a prosecutor makes—judgments about which investigative techniques to employ, how much resources to expend in the investigation, when to grant immunity, when to plea bargain, whether to indict—cannot be reduced to a collection of rules. Any established rules and policies must necessarily leave enormous scope to a prosecutor's judgment and discretion. The exercise of this discretion will be governed not by formal rules but by experience and institutional environment; and as we have explained, it is the institutional environment of the Independent Counsel that introduces biases and distortions into the discretionary judgments she must make.

More fundamentally, the decision at the core of prosecutorial discretion—whether a particular case is a suitable one for the application of the criminal laws at all, or should instead be viewed as a political or an internal disciplinary matter—is plainly not a decision that can be made in accordance with formal rules. It is sometimes a decision that requires considering all the responsibilities of the Executive Branch. As a knowledeable observer has explained, while "ordinary" criminal prosecutions do not present questions that concern the President or other high officials, there is a significant class of cases in which "the decision of what legal theory to press on the court, what interpretation of the statute to

urge, what settlement, perhaps, to adopt, is just as much dependent upon one's policy preferences as it is upon one's judgment as to the facts and law books read in the way a lawyer does . . . . [T]he President should have the power and responsibility for making these decisions . . . or at least should have someone who is attuned to his philosophy of government making them." *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess 202 (1974) (statement of Archibald Cox).

3. Appellant further argues (Br. 20-21) that the Independent Counsel will not be cut off from the institutional resources of the Department of Justice because she can "request assistance from the Department," which, under the statute, the Department "shall provide" (28 U.S.C. 594(d)). This argument is unrealistic, in several respects. First, this provision contains no requirement that the Independent Counsel consult the Department of Justice. It is unlikely that an Independent Counsel, who has been appointed precisely so that the Department will not conduct the investigation, would risk the public outcry that might result if she were consistently governed by the Department's judgment on significant issues relating to the investigation.

Perhaps most important, even if the Independent Counsel were to ask the advice of Department of Justice officials on important issues, it is unlikely that they would be able to give her useful guidance. That is because Department officials will have had no contact with the investigation as it progressed. All background information about the investigation is localized in the Office of Independent Counsel. Department of Justice officials will not be in a position not to know the background of factual developments and previous tactical decisions that must inform any prosecutor's judgment. They will be able to participate only in isolated aspects of the investi-

gation, taken out of context. In these circumstances, the Department of Justice officials could not, realistically, have any significant impact on the Independent Counsel's investigation.[8]

4. Finally, appellant suggests that 28 U.S.C. 596(a), which provides that the Attorney General may remove the Independent Counsel "for good cause," protects against the kinds of biases and distortions we have described. Br. 19. This argument is incorrect for many reasons. To begin with, the contours of the "good cause" requirement are not well established in the law. It is by no means clear, for example, that even multiple egregious errors of judgment or a pattern of abusive acts (short of legal wrongdoing) would constitute good cause. But in addition, appellant's argument overlooks two relatively subtle but extremely important practical aspects of the removal power.

First, as a practical matter, the most serious problems created by the Independent Counsel provisions—the dangers of excessive zeal and single-mindedness, of loss of perspective and errors of judgment, of interference with other responsibilities of the Executive Branch—cannot be dealt with by removal or threats of removal. Removal is an ultimate weapon, rarely used or even threatened. On the practical, day-to-day level, the great power of prosecutors is effectively controlled by more subtle means—by socializing them into the internal culture of the Department of Justice; by pointing out their errors; by persuading them to change course; by overruling them on specific,

[8] This lack of information will also make it practically impossible for Department of Justice officials to monitor the Independent Counsel's use of resources. As we noted (page 11, *supra*), under 28 U.S.C. 594(d) the Department of Justice is required to supply the Independent Counsel with "the resources and personnel necessary to perform [her] duties." Even assuming that the statute permits the Department to play a role in determining what resources are "necessary," Department officials, cut off from knowledge about the progress of the investigation, will be in no position to make such a determination.

narrow issues. These are the devices that actually influence the way prosecutors use their discretion. They are, of course, precisely the devices that the Independent Counsel provisions foreclose to the Attorney General.

Second, appellant's suggestion that the Attorney General can use the removal power to protect against the dangers of the Independent Counsel provisions assumes, again, that the Attorney General is in a position to evaluate the Independent Counsel's decisions. In fact, as we explained, because the Office of Independent Counsel controls all the information developed in the course of the investigation, the Attorney General will be unacquainted with the background against which the Independent Counsel makes her decisions. Consequently, the Attorney General will seldom be able to determine whether a specific decision made by the Independent Counsel was within the bounds of reasonable discretion.[9]

D. There Are Alternative Ways to Protect Criminal Prosecutions From Political Interference Without Compromising the Integrity of the Executive Branch.

We of course agree with the goal of the Independent Counsel provisions. Wrongdoing by high government officials should not be countenanced; allegations of wrongdoing should be investigated vigorously and fairly. But the flexible scheme of separation of powers designed by the Framers is more than equal to this task. There are ample ways to protect the independence of a criminal in-

[9] In addition, of course, the political costs of dismissing an Independent Counsel make it unlikely that an Attorney General could take that step for anything short of the most extreme wrongdoing. We emphasize in this connection that the political costs of dismissing a prosecutor investigating high government officials are an important aspect of the constitutional system of checks and balances and democratic accountability. But those costs will be incurred if the Attorney General attempts to dismiss a prosecutor who is within the Executive Branch and subject to dismissal at will. There is no sufficient reason for the additional insulation provided by the Independent Counsel provisions.

vestigation from political interference without going to the lengths of the Independent Counsel provisions.

For example, the Constitution permits Congress to require the advice and consent of the Senate to the appointment of an officer comparable to an Independent Counsel. Senatorial confirmation would help ensure that the appointment was not made for partisan reasons; it is not necessary to deny the President the power of appointment or to isolate the Independent Counsel from the Executive Branch. Or Congress might, if it believed that a special prosecutor was necessary, specify a term of office that would help ensure that the appointment was not made with a specific case in mind. Congress can provide that the term will overlap different Presidential terms, thus further reducing the risk of partisanship. Congress has the option, under the Constitution, of establishing an Independent Counsel who is not within the Department of Justice, if it considers that course desirable.

Thus Congress, if it believes that some form of special prosecutor is needed, has available to it a number of options that do not conflict with the Framers' design and therefore do not produce the severe institutional distortions of the current Independent Counsel provisions. An office inside the Executive Branch would be within the network of intra-Branch and intra-Department checks and balances; it would develop an institutional memory and sense of perspective; it would not institutionalize the single-minded focus on a particular defendant that is characteristic of the current system. It would develop institutional means of accommodating the responsibilities and interests of other components of the Executive Branch.

Any institutional arrangement designed to handle such a sensitive task as the prosecution of high-ranking government officials will have potential weaknesses. The great error of the current Independent Counsel provisions is their exclusive focus on one concern—the risk of improper influence—and their disregard of the perhaps more subtle but very serious practical problems we have described. One of the deepest commitments of the Framers was that no official should exercise discretionary power unchecked by institutional restraints. The Independent Counsel provisions are not consistent with that commitment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1988

APPENDIX

APPENDIX

"THE FEDERAL PROSECUTOR"

An Address

by

ROBERT H. JACKSON,
Attorney General of the United States

Delivered at

The Second Annual Conference of
United States Attorneys

Great Hall
Department of Justice Building
Washington, D.C.

April 1, 1940
10 A.M.

THE FEDERAL PROSECUTOR

It would probab'y be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.

These powers have been granted to our law-enforcement agencies because it seems necessary that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.

Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to

win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of federal prosecutor.

Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not be assumed by a centralized Department of Justice. It is an unusual and rare instance in which the local District Attorney should be suspended in the handling of litigation, except where he requests help of Washington. It is also clear that with his knowledge of local sentiment and opinion, his conduct with and intimate knowledge of the views of the court, and his acquaintance with the feelings of the group from which jurors are drawn, it is an unusual case in which his judgment should be overruled.

Experience, however, has demonstrated that some measure of centralized control is necessary. In the absence of it different district attorneys were striving for different interpretations or applications of an Act, or were pursuing different conceptions of policy. Also, to put it mildly, there were differences in the degree of diligence and zeal in different districts. To promote uniformity of policy and action, to establish some standards of performance, and to make available specialized help, some degree of centralized administration was found necessary.

Our problem, of course, is to balance these opposing considerations. I desire to avoid any lessening of the prestige and influence of the district attorneys in their districts. At the same time we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law.

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal

prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. The lawyer in public office is justified in seeking to leave behind him a good record. But he must remember that his most alert and severe, but just, judges will be the members of his own profession, and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance. Reputation has been called "the shadow cast by one's daily life." Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. Whether one seeks promotion to a judgeship, as many prosecutors rightly do, or whether he returns to private practice, he can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just.

The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many district attorneys from the embarrassment of what have heretofore been regarded as legitimate expectations of political service. There can also be no doubt that to be closely identified with the intrigue, the money raising, and the machinery of a particular party or faction may present a prosecuting officer with embarrassing alignments and associations. I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and their prestige to participate in the operation of the machinery of practical politics.

There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

In times of fear or hysteria political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in those cases which deal with so-called "subversive activities." They are dangerous to civil liberty because the prosecutor has no definite standards to determine what constitutes a "subversive activity," such as we have for murder or larceny. Activities which seem benevolent and helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as "subversive" by those whose property interests might be burdened or affected thereby. Those who are in office are apt to regard as "subversive" the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was not so long ago that both the term "Republican" and the term "Democrat" were epithets with sinister meaning to denote persons of radical tendencies that were "subversive" of the order of things then dominant.

In the enforcement of laws which protect our national integrity and existence, we should prosecute any and every *act* of violation, but only overt acts, not the expression of opinion, or activities such as the holding of meetings, petitioning of Congress, or dissemination of news or opinions. Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor.

Another delicate task is to distinguish between the federal and the local in law-enforcement activities. We must bear in mind that we are concerned only with the prosecution of acts which the Congress has made federal offenses. Those acts we should prosecute regardless of local sentiment, regardless of whether it exposes lax local enforcement, regardless of whether it makes or breaks local politicians.

But outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and of morals. And the moral climate of the United States is as varied as its physical climate. For example, some states legalize and permit gambling, some states prohibit it legislatively and protect it administratively, and some try to prohibit it entirely. The same variation of attitudes towards other law-enforcement problems exists. The federal government could not enforce one kind of law in one place and another kind elsewhere. It could hardly adopt strict standards for loose states or loose standards for strict states without doing violence to local sentiment. In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. Just as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly.

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Supreme Court, U.S.
FILED
APR 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS AND CAROL E. DINKINS,
Appellees.

On Appeal From The United States Court of Appeals For The District Of Columbia Ciruit

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BRIEF OF MICHAEL K. DEAVER AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87—1279

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS AND CAROL E. DINKINS,
Appellees.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF OF MICHAEL K. DEAVER AS AMICUS CURIAE IN SUPPORT OF THE APPELLEES

STATEMENT OF INTEREST

Amicus curiae Michael K. Deaver ("Mr. Deaver") is the very first individual to be indicted, tried and convicted as a result of proceedings conducted by an Independent Counsel. Both before and after his indictment, Mr. Deaver brought legal challenges to the power of the Independent Counsel to proceed against him, raising as grounds for these challenges the same attacks on the constitutionality of the statute that are at issue in this case. Although the district court denied these challenges, the issues they raised have been fully preserved for appellate review. The resolution of these issues here, therefore, may have a direct impact on the status of Mr. Deaver's case.

In addition, the *Deaver* case demonstrates all too well the dangers of unleashing upon an individual citizen the unaccountable exercise of power by an independent counsel appointed by the court of ap-

peals in the jurisdiction in which that individual ultimately is brought to trial. Public figures may be fair game in the press and before congressional committees, but they are entitled under the Constitution to criminal process free from the taint of politics, conflicts of interest by those who prosecute them, and the appearance of partiality by the courts before which they are tried. Contrary to the assertions of *amicus curiae* Whitney North Seymour, Jr., Mr. Deaver enjoyed none of these hallmarks of our criminal justice system under the dual system of justice created by the Act.

SUMMARY OF ARGUMENT

The independent counsel provisions of the Ethics in Government Act ("the Act") violate Articles I, II and III of the Constitution and the principles of separation of powers those Articles incorporate, both by distorting the balance of power among the several branches, and by inviting abuses of our nation's prosecutorial power in individual cases brought under the Act.

The investigation and prosecution of criminal offenses are functions at the core of the executive power, which Article II of the Constitution delegates exclusively to the President. The Act, however, divests the President and his agents of their power to perform or supervise the performance of these functions, while simultaneously granting portions of that power to the Special Division of the Court of Appeals and to the Congress, and transferring the remainder to a person unaccountable to any of the coordinate branches, in violation of Articles I, II and III of the Constitution.

The Act further distorts the constitutional system of separated powers by 1) providing for judicial appointment of independent counsel; 2) preventing the President from removing independent counsel at will; and 3) granting the Special Division of the Court of Appeals independent authority to terminate an independent counsel's office.

Together, these features of the statute reflect a conscious design to usurp core executive power from the Executive Branch and to

transfer it to an individual who is accountable only to the Judicial and Legislative branches, or to no one at all. Such a reallocation of constitutional authority by Congress, no matter how assertedly expedient a response to the purported ills of Watergate, is impermissible under the form of government established by our Constitution. In its recent operation, moreover, the Act has proved to be a "cure" far more dangerous to the public interest and the rights of individual citizens than the supposed ills it was intended to remedy, underscoring once again the need for this Court to exercise its constitutional obligation to restore and preserve the proper balance of power among the coordinate branches, and "to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

ARGUMENT

I. THE ACT DEPRIVES THE PRESIDENT OF HIS EXCLUSIVE AUTHORITY TO EXERCISE CORE EXECUTIVE POWER.

The Framers' decision to vest in a single official the full power and duty to see to the execution of the laws reflects a conscious preference for a unitary and energetic executive with the authority necessary to ensure "steady administration of the laws." *The Federalist* No. 70, at 423 (A. Hamilton) (C. Rossiter ed. 1961). The executive authority conferred on the President by Article II, § 3, is the power "to implement the legislative mandate." *Bowsher v. Synar*, 106 S. Ct. 3181, 3192 (1986). Central to this power is the authority to prosecute civil and criminal litigation. The centrality of these law enforcement and prosecutorial functions to the task of executing the laws, together with the explicit textual commitment of that task to a single individual, the President, necessarily implies that the President must have the power to direct those officers who actually carry out the enforcement of the laws.

Early in our Nation's history, Attorney General (later Chief Justice) Roger B. Taney reached precisely this conclusion in his opinion

regarding *The Jewels of the Princess of Orange*, 2 Op. Atty. Gen. 482 (1831). The issue in *Jewels* was whether the President could order a United States district attorney to halt a prosecution. Taney answered in the affirmative, reasoning that the President's authority to direct a district attorney in the performance of his duties "derived from the general supervisory powers which belong to his office, and which are necessary to enable him to perform the duty imposed upon him, of seeing that the law is faithfully executed." *Id.* at 488. Chief Justice Taft reiterated Taney's conclusion a century later in *Myers v. United States*, 272 U.S. at 135:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone.[1]

The Ethics in Government Act forecloses direction of an independent counsel by the President and his agents by establishing that an independent counsel has "independent authority" to carry out his duties, 28 U.S.C. § 594(a), and that the President's agents are to have no role in performing the tasks delegated to an independent counsel save at the independent counsel's request. 28 U.S.C. § 597(a). By depriving the President of his essential authority to direct one who exercises core executive powers, the statute strips the President of those powers, and thus "prevents the Executive

[1] *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), is not to the contrary. *Kendall* holds only that Congress may impose ministerial duties on executive officers, and that the President may not order such officers to defy the law. The case does not contest that in performing their discretionary duties under the law such officers are subject to the President's supervision. *See* Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 59 n.65.

Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977).

The denial of Presidential authority not only deprives the Executive Branch of its essential prosecutorial discretion, but also interferes with other areas of Presidential authority, such as foreign affairs. The consequences of the absence of Executive Branch supervision in this area were illustrated on several occasions in the *Deaver* case. For example, *Amicus Curiae* Seymour, provoked an international incident last spring by sending FBI agents to the Canadian Embassy, against the wishes of the State Department and in violation of accepted principles of diplomatic immunity, to attempt to serve subpoenas on the Ambassador of Canada and his wife. Mr. Seymour's efforts were formally opposed by the State Department and the Department of Justice, and eventually were rebuffed by the District Court, *see United States v. Deaver*, Cr. No. 87-096 (D.D.C. June 22, 1987), but not before Mr. Seymour had publicly accused the Canadian Government of "duplicity" and "obstructing justice," *id.*, May 27, 1987 Declaration of Whitney North Seymour, Jr., at 5, 8, and not before he had charged Abraham D. Sofaer, Legal Adviser of the State Department, with making "inaccurate" and "misleading" statements and with not being "impartial." *Id.*, June 10, 1987 Declaration of Whitney North Seymour, Jr., at 1, 2, 7.

Mr. Seymour then sparked yet another diplomatic crisis with Canada immediately before trial. Frustrated in his attempt to serve the Canadian ambassador with a trial subpoena, he sent a letter to the Canadian Government threatening to introduce at trial evidence unrelated to the subject matter of the Ambassador's testimony, but that supposedly related to unlawful actions taken by Mr. Deaver on Canada's behalf, if Canada did not waive its diplomatic immunity and produce its Ambassador as a prosecution witness. *See id.*, Supplemental Statement of Interest of the United States (Oct. 15, 1987). Not surprisingly, this tactic, too, provoked a diplomatic protest by the Canadian Government and again required intervention by the

State Department and the Department of Justice.[2] Finally, Mr. Seymour held a press conference on the Courthouse steps following the trial and blamed the Canadian Government for Mr. Deaver's acquittal on the perjury charges relating to acid rain.[3] *See id.*, Defendant's Supplemental Memorandum In Support of His Previously Filed Motion to Dismiss On Constitutional Grounds (January 5, 1988). Mr. Seymour's intemperate public attacks on the Canadian Government highlight the problems of granting prosecutorial powers to an unaccountable individual outside the Executive Branch.

Appellant argues that the Act's prohibition against the President having any supervisory role with respect to an independent counsel is allayed by the statute's grant to the Attorney General of unreviewable authority to determine whether the independent counsel process shall be initiated. *See* App. Br. at 18-19. But in view of its severe circumscription, this so-called "authority" is no authority at all. The Act plainly is designed to *curtail* the Attorney General's authority and discretion not only by commanding him to conduct a preliminary investigation under specified circumstances, but also by requiring him to request appointment of an independent counsel 1) unless that investigation reveals *no* reasonable grounds for further investigation, or 2) if the investigation is not completed within ninety days. 28 U.S.C. §§ *591, 592; see also Dellums v. Smith*, 797

[2]Mr. Seymour challenged this intervention in part on the ground that the Executive Branch had no jurisdiction to interfere with his investigation and prosecution of Mr. Deaver. *See United States v. Deaver*, Independent Counsel's Response To "Supplemental Statement Of Interest Of The United States" (October 16, 1987).

[3]This was a hollow excuse for the acquittal inasmuch as Mr. Seymour had earlier withdrawn from the jury's consideration the few portions of this Count which related to the Ambassador. Mr. Seymour also used the occasion of his post-trial courthouse-steps press conference to publicly attack the integrity of the Reagan Administration generally, and to denounce Secretary of State Schultz for having expressed, during his testimony at trial, a favorable opinion of Mr. Deaver. *See United States v. Deaver*, Defendant's Supplemental Memorandum In Support of His Previously-Filed Motion to Dismiss on Constitutional Grounds (January 5, 1988).

F.2d 817, 823 (9th Cir. 1986). Assuming the Attorney General obeys the law, these directives provide insufficient scope for the Executive Branch's exercise of prosecutorial discretion, which encompasses far more than the power merely to determine whether "further investigation" is warranted:

> [I]n the first instance an Attorney General in myriad situations must exercise the discretion conferred upon him by law. He must evaluate the evidence necessary to an informed judgment. He must decide whether to prosecute or not. He must decide whom to prosecute. He must decide when to prosecute. Functions in this area belong to the Executive under the Constitution, Article II, Sections 1 and 3 . . . .

Weisberg v. United States Department of Justice, 489 F.2d 1195, 1201 (D.C. Cir. 1973) (*en banc*). In leaving only a fraction of prosecutorial discretion with the Attorney General, effectively dictating how that fraction is to be exercised, and irrevocably committing the remainder to an officer outside the President's control, the statute violates the cardinal principle of unified executive control over the enforcement of the laws.

Significantly, *amicus curiae* Seymour argues that the Act leaves virtually all of the Executive Branch's prosecutorial discretion with the Attorney General. Mr. Seymour bases this argument on his view that the Attorney General's preliminary finding that there exist reasonable grounds to believe that further investigation *or* prosecution is warranted, *see* 28 U.S.C. § 592(c)(1), amounts to an exercise of prosecutorial discretion by the Executive Branch with respect to the ultimate decision to prosecute. Therefore, according to Mr. Seymour, an independent counsel's decisions to obtain an indictment and prosecute are but "ministerial" acts. Seymour Br. at 14-17. This argument, however, not only ignores the range and breadth of issues and concerns that inform a constitutionally-empowered prosecutor's ultimate decision whether to prosecute at the conclusion of a full investigation, *see Department of Justice Manual*, Vol. 8, 9-27.200-27.270 (June 1987), but it also fails to

explain how the Attorney General could have made a decision to prosecute Mr. Deaver for false statements before a grand jury that had not even been convened as of the date of the Attorney General's preliminary investigation. Indeed, to equate the Attorney General's preliminary finding with an ultimate decision to prosecute, as does Mr. Seymour, is considerably more alarming even than the much-debated statement by Independent Counsel Lawrence E. Walsh that he felt obligated to prosecute in the Iran-Contra investigation if his investigation revealed probable cause to believe that a crime had been committed.

Under Mr. Seymour's theory, the target of an independent counsel investigation *must* be prosecuted once the Attorney General finds that there are reasonable grounds to believe that further investigation or prosecution is warranted, so long as there are any facts concerning any matter that will support any theory of prosecution. While this interpretation of the Act may explain Mr. Seymour's decision to obtain an indictment charging Mr. Deaver with perjury after being appointed to investigate allegations of violations of 18 U.S.C. § 207, it does obvious violence both to the Department of Justice guidelines governing the exercise of prosecutorial discretion, as well as to the due process rights of the subjects and targets of these investigations.[4] It also points up once more the very real dangers

[4]For example, Mr. Seymour charged Mr. Deaver with five counts of perjury, three of which contained multiple allegations of false testimony. One count, in fact, contained no less than 20 separate allegedly false statements. *See United States v. Deaver*, Indictment (March 18, 1987). Even more disconcerting, perhaps, another count charged Mr. Deaver with perjury based upon a perjury trap set by Mr. Seymour himself. After advising Mr. Deaver that the next question he would be asked was merely for background purposes, Mr. Seymour asked Mr. Deaver whether he had ever contacted anyone in the government on behalf of TWA, a client Mr. Deaver had not been advised would be a subject of inquiry before the grand jury. Mr. Deaver said he did not recall whether he had or not, and Mr. Seymour moved on. Mr. Seymour did not mention that weeks earlier he had received a tip from a reliable source that Mr. Deaver had contacted then-Secretary of Transportation Elizabeth Dole on behalf of TWA. Nor did he attempt to refresh Mr. Deaver's recollection before the grand jury concerning this alleged contact; he merely turned to other

of entrusting the nation's prosecutorial power to an individual who is not a part of Executive Branch. Armed with such a notion of his mandate, an independent counsel could, as Mr. Seymour plainly did, embark on a mission to return an indictment against the target of his investigation no matter how long it took, no matter what the cost to the government or to the target, no matter how inconsistent it might be with Justice Department guidelines, and no matter how far afield it was from the initial allegations assigned to him for investigation and possible prosecution.

The potential for this kind of abuse arising from the unaccountable exercise of power was of grave concern to the Founding Fathers.[5] As James Madison observed in his Federalist Paper No. 51:

matters. *See id.*, Motion of Defendant Michael K. Deaver To Dismiss Count Three On Grounds Revealed By Newly Discovered Evidence (May 8, 1987).

[5]In laying the framework for a new government, the delegates to the constitutional convention were conscious of the principle that the vesting of executive power in an unaccountable individual was an invitation to tyranny. Accordingly, they crafted an executive branch in which the president was to be elected to serve for a limited four year term, and they provided procedures for impeachment and removal from office. *See Bowsher v. Synar*, 106 S. Ct. at 3186. The drafters, however, specifically rejected proposals to check executive power by dividing that power among several magistrates or by creating a council of revision. *See* 1 M. Farrand, Records of the Federal Convention (1966) at 93-114 (debate of June 4, 1787); *see also The Federalist* No. 38, at 236-37 (J. Madison) (C. Rossiter ed. 1961); *id.* No. 48, at 312 (J. Madison); *id.* No. 69, at 417 (A. Hamilton); *id.* No. 70 at 424-31 (A. Hamilton); *id.* No. 77, at 461-63 (A. Hamilton). These proposals were rejected not only because a single magistrate would be more efficient, but also because "Unity in the Executive ... would be the best safeguard against tyranny." 1 M. Farrand at 66, 74 (remarks of Mr. Wilson); *see also The Federalist* No. 70, at 427-30 (A. Hamilton). The creation of an independent counsel possessing significant executive powers therefore violates two core principles underlying Article II of the Constitution: *first*, that the possessor of executive power should be accountable to the people, and *second*, that competing sources of executive authority lead to tyranny. Unlike any other person exercising core executive power in our government, the independent counsel is accountable only to himself.

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51, at 322 (J. Madison). Significantly, Mr. Seymour makes much in his brief of the service that he, as an independent counsel, purportedly has done in the public interest in prosecuting Mr. Deaver, and of the confidence expressed by the public in the results his office achieved. *See, e.g.*, Seymour Br. at 9, 11, 13. But such attempts to bootstrap assertions regarding the necessity and integrity of the office of independent counsel by way of talismanic invocations of an unanchored notion of the public interest are unavailing. In our democratic government of checks and balances, where numerous competing interests constantly vie for supremacy, the public interest can only truly be ascertained and served through the workings of the constitutional processes of that government. As one commentator has observed:

> The Framers created three departments of government, according to Madison, in order to avoid the accumulation of all powers in the same hands, a condition that "may justly be pronounced the very definition of tyranny." Mere "parchment barriers" between the branches would not prevent tyranny, because power is of an "encroaching nature." To prevent the gradual concentration of power in a single department, therefore, it was necessary to give to "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." Ambition would counteract ambition, and the government would gain needed stability through a dynamic tension of opposing forces.

Miller, *Government Lawyers' Ethics In A System Of Checks And Balances*, 54 U. Chic. L. Rev. 1293, 1296 (1987) (footnotes omitted). There is no surer anchor for the floating concept of the public interest than the accountable exercise of power pursuant to the doctrine of the separation of powers. Cut loose from the constitutional moorings of checks and balances, an independent counsel can only disserve the public interest.

We reinforce this argument in the succeeding sections by demonstrating that, to the extent independent counsel are accountable at all, they are beholden only to Congress and the Courts, and thus exercise core executive power in violation of well-settled principles of separation of powers. And to the extent, as appellant and others contend, independent counsel are answerable to neither of these coordinate branches, they exercise plenary power unhitched from the structural separation-of-powers principles devised by the Framers to ensure against tyranny and the arbitrary exercise of power.

II. THE ACT IMPERMISSIBLY INJECTS THE JUDICIAL BRANCH INTO THE EXERCISE OF CORE EXECUTIVE POWER.

The judiciary's supreme authority "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is narrowly circumscribed by the command that it be exercised only in the context of justiciable cases or controversies. As this Court explained in *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 (1947):

> The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the

> courts for the decision of issues, between litigants, capable of effective determination.

The case-or-controversy requirement of Article III necessarily excludes any general judicial authority to supervise the execution of the laws. *See, e.g., Vermont v. New York*, 417 U.S. 270, 277 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J. concurring).

The Act transgresses this limitation by assigning to a Special Division of the Court of Appeals — in the complete absence of a case or controversy — the power to assign an independent counsel his duties through the nonjudicial acts of defining or redefining his jurisdiction, or of assigning him new matters to investigate, 28 U.S.C. §§ 593(b) and (c); to demand from an independent counsel an accounting of his conduct in office, 28 U.S.C. §595(b); and to determine for itself whether he has completed his assigned duties. 28 U.S.C. § 596(b)(2). The essentially supervisory and executive nature of this authority, as well as its centrality to the legislative scheme, were underscored in the Senate Committee Report on the bill that became the Ethics in Government Act:

> [A] very important part of the responsibility of the division of the court is to define the prosecutorial jurisdiction of the special prosecutor. The prosecutorial jurisdiction of the special prosecutor is one of the most important devices for the *control* of the special prosecutor and the *accountability* of such a special prosecutor.

S. Rep. No. 95-170, 95th Cong., 1st Sess. 56 (1977), *reprinted* in [1978] U.S. Code Cong. & Admin. News 4216, 4272 (emphasis supplied). Vesting such power to *control* executive action in a court clearly violates the principles of separation of powers enshrined in both Article II and Article III of the Constitution.

In addition, the Special Division has conceived its authority to extend to the issuance of directives purporting, *inter alia*, to (1) resolve jurisdictional arguments between independent counsel and the Justice Department, *see In re Olson*, 818 F.2d 34 (D.C. Cir. Indep. Couns.

Div. 1987); (2) decide constitutional issues not raised by any parties and over which the Special Division has no jurisdiction, *see id.*; and (3) determine the employment classification of independent counsel and their associates, and exempt them from the operation of federal conflict-of-interest laws, *see In re Michael K. Deaver, Designation of Special Government Employees*, Division No. 86-2 (July 2, 1986); *In re Theodore B. Olson*, Division No. 86-1 (June 18, 1986). The latter orders even go so far as to establish "the Office of Independent Counsel as a separate special agency" — a stunning usurpation of non-judicial authority.[6] The issuance of these orders, as well as the reliance of various independent counsel upon the orders in their disputes with the Justice Department,[7] demonstrates the reality of the extrajudicial power conferred upon the Special Division by the Act.[8]

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[6] *Cf. Sealand Service, Inc. v. ICC*, 697 F.2d 1166, 1168 (D.C. Cir. 1983) ("It is the responsibility of Congress and the Executive Branch, not the courts, to apportion authority between a cabinet officer and an independent agency such as the ICC."). Although the Act as recently amended contains its own legislatively-devised exemptions for independent counsel from federal conflict-of-interest statutes, there is no reason to be sanguine that the Special Division will not reach out and decide other equally nonjudicial issues in the future in its effort to administer the Act and supervise the exercise of executive power.

[7] *See Alexia Morrison: Taking the Heat*, Legal Times, June 1, 1987, at 8, col. 2-3 ("Morrison also points out that she and Seymour were granted exemptions to the conflict laws from the special federal court panel that oversees the independent counsel probes").

[8] The processes through which the Special Division exerts its authority are also revealing of the relationship between independent counsel and the court. According to a statement submitted to a subcommittee of the House Judiciary Committee by Presiding Judge MacKinnon, the orders purporting to exempt independent counsel from conflict of interest laws were issued after Independent Counsels Seymour and Morrison together visited Judge MacKinnon in his chambers and asked that the order be entered. Judge MacKinnon concluded that the orders comported with his understanding of the statute and issued one of them that same day. (Whether he consulted the other members of the "court" is unclear.) *See* U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations, Supplemental Statement of George E. MacKinnon, at 5-7.

Once again, the *Deaver* case provides a telling illustration of the Special Division's assumption of supervisory authority under the Act. When Mr. Seymour was appointed to investigate Mr. Deaver, his jurisdiction was defined to encompass three specific allegations of possible violations of 18 U.S.C. § 207 by Mr. Deaver in connection with his representation of two clients, as well as matters "related" to those allegations. *See In re Michael K. Deaver, Order Appointing Independent Counsel*, Division No. 86-2 (May 29, 1986). Significantly, although other allegations of possible section 207 violations were submitted to the Justice Department for investigation, they were not included in Mr. Seymour's jurisdiction at the conclusion of the Attorney General's preliminary investigation. Nevertheless, Mr. Seymour proceeded to subpoena every document ever generated by Mr. Deaver's firm, as well as tens of thousands of other documents from throughout the government and from Mr. Deaver's clients as part of an investigation of *all* of Mr. Deaver's business activities on behalf of virtually *all* of his clients — including separate inquiries into the legality of *all* of the business activities of *all* of Mr. Deaver's associates on behalf of these clients.[9]

Seven months into his investigation, however, Mr. Seymour turned his attention to other possible prosecution theories, including whether false statements had been made before the Deaver grand jury; whether false statements had been made at a congressional subcommittee hearing that predated Mr. Seymour's appointment; and whether Mr. Deaver had conspired with any of his associates to violate any laws. Challenged by Mr. Deaver as to his jurisdiction to investigate these new matters, Mr. Seymour turned for guidance not to the Justice Department, as appellant Morrison properly did in the Olson investigation, but to the Special Division, submitting a secret petition for "clarification" of his jurisdiction. The Special Division obliged with an order granting Mr. Seymour jurisdiction to proceed against Mr. Deaver on perjury and false statement

[9]In addition to subpoenaing documents, Mr. Seymour ordered approximately 300 FBI field interviews and called between 110 and 150 individuals before the grand jury.

charges, as well as to investigate any associate or employee of Mr. Deaver and any other person who may have conspired with Mr. Deaver to violate any law. *See In re Michael K. Deaver, Supplemental Order*, Division No. 86-2 (Dec. 16, 1986).[10]

Ironically, the Special Division's Order had the unintended effect of eviscerating the argument, advanced here by appellant and others, that under the Division's prior decision in *In re Olson*, the Attorney General retains an ongoing, supervisory check on an independent counsel's jurisdiction. For under the Division's ruling in the *Deaver* case, *In re Olson* is now a nullity for all practical purposes: all an independent counsel must do to expand his or her jurisdiction is bypass the Attorney General's office altogether, and proceed by way of secret *ex parte* application to the Special Division. The Division's Order in the *Deaver* case also reveals the nature of the authority wielded by the court under the Act. Supervising executive officers in the performance of their duties by responding to their *ex parte* requests for guidance or expanded authority is in no sense the exercise of a judicial function; it is, pure and simple, an assumption of executive power.

Finally, the exercise of executive power by the courts also raises serious due process concerns resulting from its tendency to erode — whether as matter of fact or only as a matter of public perception — the objectivity and independence of the judiciary. *See, e.g., Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245, 3256 (1986); *United States v. Will*, 449 U.S. 200, 218 (1980); *In re Application of President's Commission on Organized Crime*, 763 F.2d 1191, 1197 (11th Cir. 1985). In the *Deaver* case, this problem was particularly acute. The indictment Mr. Seymour obtained expressly stated that Mr. Seymour had been appointed independent counsel in the case by the Special Division of the Court of Appeals

[10]As a result, Mr. Seymour eventually advised seven other individuals in addition to Mr. Deaver that they were either subjects or targets of his investigation and therefore risked prosecution by his office, despite the absence of any authority from the Justice Department or the Attorney General's office to enforce such threats.

for the District of Columbia Circuit. *See United States v. Deaver*, Indictment (March 18, 1987). The district court before which the *Deaver* case was tried, moreover is in the same jurisdiction as the Special Division which appointed Mr. Seymour, and which later issued a decision upholding the constitutionality of the Act. *See In re Olson*. Thus, even though the Special Division had no jurisdiction to decide the constitutional issue, the district court felt bound to follow that decision, and expressly relied upon it in its memorandum order denying Mr. Deaver's post-indictment challenge to the constitutionality of the Act. *See United States v. Deaver*, Mem. Order (May 13, 1987). In addition, the district court understandably was reluctant to overrule the Special Division's selection of Mr. Seymour as independent counsel. Accordingly, it not only denied without explanation Mr. Deaver's motion under *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987), to ensure that neither Mr. Seymour nor any of his associate independent counsel had a conflict of interest in the case, *see United States v. Deaver*, Order (October 5, 1987), but it also denied without a hearing Mr. Deaver's subsequent motion to disqualify Mr. Seymour on the grounds of his personal and political conflict of interest in the case. See text *infra* at p. 23. The special relationship between an independent counsel and the Special Division of the court, together with the district court's natural deference to the court of appeals, call into question the appearance of fairness, objectivity and impartiality otherwise attending court rulings. Indeed, in view of the apparent conflict between the district court's obligation to ensure Mr. Deaver a fair trial, and its conceded deference to the Special Division that hand-picked the prosecutor and then guided and endorsed his investigation, none of the rulings entered by the district court can be considered free of the taint of at least an appearance of partiality. Due process and Article III of the Constitution, however, require more than that in a criminal case in which a man's liberty is at stake.

III. THE ACT IMPERMISSIBLY GRANTS SUPERVISORY AUTHORITY OVER EXECUTIVE FUNCTIONS TO THE LEGISLATIVE BRANCH.

The Constitution for the most part limits Congress to a legislative role. With a few specific exceptions, the only authority granted to Congress by the Constitution is the authority to legislate upon specific subjects. *See generally INS v. Chadha*, 462 U.S. 919 (1983). In the execution of the laws enacted through this process, Congress has no part: "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Bowsher v. Synar*, 106 S. Ct. at 3187. "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 3188.

The Act's provisions granting the House and Senate Judiciary Committees a role in the initiation of the independent counsel process, as well as requiring independent counsel to report to Congress and to cooperate with congressional oversight, impermissibly assign an executive role to Congress. While it is true that Congress may exercise oversight and investigative functions where these are related to its legislative role, *see, e.g., McGrain v. Dougherty*, 273 U.S. 135 (1927), Congress is not entitled to exceed its legislative limits. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Watkins v. United States*, 354 U.S. 178 (1957). Here, the provisions that make an independent counsel answerable to Congress clearly expand Congress's role beyond that incidental to its legislative function. For as the committee reports indicate, the purpose of the provisions requiring independent counsel to report to Congress and to "cooperate" with congressional oversight was not to aid Congress in its legislative tasks, but to ensure the "accountability" of independent counsel and to prevent "the possibility of a runaway [special] prosecutor." S. Rep. No. 95-170, 95th Cong., 1st Sess. 70 (1977), *reprinted* in [1978] U.S. Code Cong. & Admin. News 4216, 4286; H.R. Conf. Rep. No. 95-1756, 95th Cong., 2d Sess. 78 (1978),

reprinted in [1978] U.S. Code Cong. & Admin. News 4381, 4394.[11] Such a supervisory role for Congress in the execution of the laws is expressly forbidden by *Bowsher v. Synar*, 106 S. Ct. at 3187-3189, and *INS v. Chadha*, 462 U.S. at 954-955.

In the *Deaver* case, Congress in fact actively directed the course of Mr. Seymour's investigation and prosecution. Two of the charges on which Mr. Deaver stood trial stemmed directly from the "referral" of perjury charges to Mr. Seymour by Representative John D. Dingell and his Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce. Despite the absence of any authorization in the Act for such congressional referral of charges — or for bypassing the Attorney General; and despite the fact that these charges related to events occuring *prior* to Mr. Seymour's appointment — and thus in no way could be deemed to have grown out of Mr. Seymour's investigation of alleged substantive Ethics Act violations — Mr. Seymour unhesitatingly assumed responsibility for investigating the allegations, and eventually based two of the five perjury counts in the indictment on Mr. Deaver's testimony before the Dingell Subcommittee. This incident reveals only too well the reality of congressional aggrandizement under the Act.

IV. THE APPOINTMENT OF INDEPENDENT COUNSEL BY A COURT VIOLATES THE APPOINTMENTS CLAUSE.

The appointment of independent counsel by the Special Division is permissible under the Appointments Clause only if an independent counsel is both an "inferior officer," and one whose appoint-

[11]At the very least, as the Department of Justice has observed, the provisions "imply that Congress could exercise control over prosecutorial decisions." 123 Cong. Rec. 21002 (1977) (Written Statement of John Harmon, Acting Assistant Attorney General, Office of Legal Counsel). The Department of Justice recommended that this "implication" be avoided by deleting the oversight provision. *See id.* Instead, Congress confirmed the implication by retaining the language in the face of the objection.

ment by a court is not "incongruous." In determining whether these requirements have been satisfied, the Appointments Clause is not to be read in isolation, but must be viewed "in the context of th[e] cognate [constitutional] provisions" reflecting the "concern of the Framers of the Constitution with maintenance of the separation of powers." *Buckley v. Valeo*, 424 U.S. at 124. The Appointments Clause reflects the Framers' view that "each department . . . should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others." *The Federalist* No. 51, at 321 (J. Madison).

A. *An Independent Counsel Is Not An Inferior Officer*

An independent counsel under the Act is not an inferior officer for the simple reason that he has no superior. The one consistent definition in the cases is that the term "inferior officer" means an officer *subordinate* to those superior officers requiring appointment by the President. *See, e.g., Buckley v. Valeo*, 424 U.S. at 124; *United States v. Eaton*, 169 U.S. 331, 342-344 (1898); *United States v. Germaine*, 99 U.S. 508, 509-510 (1879); *Collins Case*, 14 Ct. Cl. 569, 574 (1878). This definition accords perfectly with the plain meaning of the word "inferior": "[o]ne who, in relation to another, has less power and is below him; one who is bound to obey another." Black's Law Dictionary, 918 (4th ed. 1968). It also makes coherent constitutional sense, for it assures that the ultimate lines of core executive power run through a superior officer appointed by the President with the advice and consent of the Senate. Because an independent counsel is not the subordinate of any other officer of the United States, he is not an inferior officer within the meaning of the Clause.

This conclusion also follows from the recent decision in *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S. Ct. 753 (1988), an Appointments Clause challenge to the authority of Independent Counsel Walsh. The court of appeals concluded that it need not decide the constitutionality of Mr. Walsh's appointment under the Act if his "back-up" appointment under the Attorney General's regulation was valid. An Appointments

Clause issue nevertheless was presented, because the latter appointment had not been made by the President with the advice and consent of the Senate. The validity of that appointment thus turned on whether Mr. Walsh, in his capacity as a Justice Department appointee, was an inferior officer. The court of appeals held that he was, because he was directly subordinate to the Attorney General, who could revoke the regulation at will. Unlike an independent counsel appointed under the Justice Department regulations, however, an independent counsel appointed under the Act has a *statutory* guarantee of independence that makes him more than a mere "*subordinate* . . . charged with the performance of the duty of the superior for a limited time and under special and temporary conditions." *United States v. Eaton*, 169 U.S. at 343 (emphasis added). An independent counsel under the Act is thus, in *Eaton's* terms, a "superior official."[12]

B. *Appointment of Independent Counsel By A Court Is Constitutionally Incongruous*

Even if an independent counsel could be classified as an inferior officer, it does not follow that his appointment properly can be vested in a court. The Appointments Clause's proviso that the appointment of inferior officers may be vested "in the Courts of Law" should not be construed to contradict the Framers' admonition that the separation of powers would be compromised if the other branches could appoint executive officers. *See The Federalist* No. 51, at 321 (J. Madison) (C. Rossiter ed. 1961); *Id.* No. 72, at 436 (A. Hamilton). Rather, interpretation of the Clause should recognize

[12]This same distinction renders inapplicable the reasoning of *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963), in which the court upheld the constitutionality of judicial appointment of interim United States attorneys. Unlike an independent counsel, an interim United States attorney is truly subordinate to the Attorney General in that he is subject to the Attorney General's supervision in the performance of all his duties, *see* 28 U.S.C. § 519, removable at the will of the Executive, *see Parsons v. United States*, 167 U.S. 324 (1897), and may be replaced by a permanent Presidential appointee "at any time, the judicial appointment notwithstanding." *Solomon*, 216 F. Supp. at 842-843.

that the power to appoint inferior officers "was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 258 (1839).

To be sure, *Ex Parte Siebold*, 100 U.S. 371 (1880), held that the appointive powers of the courts were not strictly limited to officers who could be classed as "judicial." But the attempt to vest the courts with appointive power over an officer empowered to exercise the full investigative and prosecutorial authority of the United States far exceeds the limits on that power that were recognized in *Siebold*. From the standpoint of separation of powers, judicial appointment of such an officer is "incongruous" not only because of the centrality of the investigative and prosecutorial functions to the President's mission to take care that the laws are faithfully executed, but also because of the lack of any judicial power with respect to those functions. *See* Currie, *The Distribution of Powers after Bowsher*, 1986 Sup. Ct. Rev. 19, 36.

The incongruity of judicial entanglement in the appointment of prosecutors is underscored by this Court's recent opinion in *Young v. United States ex rel. Vuitton et Fils S.A.*, *supra*. In *Young*, the Court held that the only reason the judicial appointment of private attorneys to prosecute criminal contempts does not violate the principle of separation of powers is that the judiciary has the inherent power to punish contempts in order "to vindicate its own authority without complete dependence on other branches." *Id.* at 2131. The Court expressly noted that the exercise of this inherent authority to punish contempts is not analogous to the "execution of the criminal law in which only the executive branch may engage." *Id.* at 2133. "Acknowledging the limited authority of courts to appoint contempt prosecutors thus provides no principle that can be wielded to eradicate fundamental separation-of-powers boundaries." *Id.* at 2134 n.10. As Justice Scalia observed, the Court's opinion creates "a special exception for prosecutions of criminal contempt" and does not contest the "well settled general princip[e]" that "since the prosecution of law violators is part of the implementation of the laws, it is — at least to the extent that it is publicly exercised —

executive power, vested by the Constitution in the President." *Id.* at 2142 (Scalia, J., concurring in the judgment). In recognizing the exceptional nature of a court's power to appoint contempt prosecutors, the majority in *Young* implicitly asserted the inappropriateness — or incongruity — of a judicial role in the appointment of prosecutors generally.[13]

Appellant urges this Court to adopt an incongruity test that is premised not on a searching inquiry into whether the appointment power granted to the court by the Act is consistent with or properly ancillary to the judicial function, but rather on an *ad hoc* inquiry into whether judges might be better suited in certain circumstances to perform a particular executive function than is the President. Such a view of the incongruity limitation, grounded completely in subjective views of expediency, is plainly at odds with the separation-of-powers principles that the Appointments Clause was intended to enshrine. If the incongruity test is to serve its function, it cannot be subject to the vicissitudes of free-ranging policy judgments as to the desirability of particular grants of appointment power; rather, it must require an inquiry into the consistency of judicial appointment with structural separation-of-powers concerns. Under this proper inquiry, the incongruity test cannot be satisfied by the assertion that judicial control over core executive functions is somehow

[3]The incongruity of the court's power to appoint independent counsel stems not only from the nature of an independent counsel's duties, but also from the nature of the functions the court must assume in conjunction with its appointment power. As the three-judge district court held in *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1977), the incongruity limitation is transgressed when a grant of appointive power to a court is coupled with actual supervisory or administrative authority over the persons appointed. *Id.* at 913 & n.14. That, of course, is precisely the case here: the Act requires not only that the Special Division appoint independent counsel, but also that the court perform significant supervisory functions, including defining the independent counsel's tasks and determining whether and when he or she has completed them. *See* 28 U.S.C. §§ 593(b) and 596(b)(2). These supervisory powers plainly run afoul of the incongruity limitation even if judicial appointment of independent counsel could, standing alone, be deemed proper.

preferable to Presidential control, for such a justification is simply impermissible under the Constitution.

C. *Courts Are Functionally Ill-Suited To Appoint Independent Counsel*

Quite apart from the inappropriateness of appellant's suggested analysis under our constitutional scheme, there is serious question as to whether entrusting the appointment of independent counsel to the court itself is a trustworthy scheme. The Act, for example, contains no guidelines or criteria for the Special Division to follow in selecting an "appropriate" independent counsel. Nowhere does the Act require the court to ascertain whether the appointee himself may have a personal or political conflict of interest that could influence the objectivity or integrity of the investigation he conducts or the prosecution he alone has the authority to bring against the target of his prosecutorial power.

The *Deaver* case illustrates the danger inherent in the statute's appointive mechanisms, for there is no evidence that the Special Division even knew, much less considered, before making its appointment in that case that Mr. Seymour had long been embroiled in a legal battle — before both the courts and the Federal Election Commission — in which he alleged that improprieties by a political PAC Mr. Deaver helped found, and with which he was closely associated, were in part to blame for Mr. Seymour's defeat in a 1982 Senate race. *See Deaver v. Seymour*, C.A. No. 87-0447, Plaintiff's Statement of Material Facts Not Genuinely in Dispute (March 5, 1987) (D.D.C.); *United States v. Deaver*, Defendant's Memorandum in Support of Motion To Dismiss One Count of the Indictment On Grounds of Prosecutorial Vindictiveness (April 20, 1987). Had Mr. Seymour's appointment been subject to confirmation by the Senate, as would that of any other person exercising the full power of the Attorney General of the United States, his involvement in that dispute even as of the date of his appointment, as well as the consequent likelihood of his lack of impartiality toward Mr. Deaver, almost certainly would have surfaced and been fully aired prior to

any appointment decision. Instead, the investigation of Mr. Seymour's personal and political background, and of any possible conflicts of interest, was left to Mr. Deaver alone, whose post-appointment uncovering of Mr. Seymour's partiality fell on deaf ears, and whose motion to disqualify Mr. Seymour before trial was denied without a hearing.

V. THE ACT'S REMOVAL PROVISIONS IMPERMISSIBLY INTERFERE WITH EXECUTIVE PREROGATIVES.

A. *The Statute Unconstitutionally Restricts the President's Removal Power*

The importance of Presidential authority to remove executive officers was explained by James Madison during the debate in the First Congress over the issue of removal of the Secretary of State:

> If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.

1 *Annals of Cong.* 499. Madison's views prevailed in the First Congress, and, in the resulting "Decision of 1789," the Congress recognized the inherent executive power of removal. *See generally Bowsher v. Synar*, 106 S. Ct. at 3187.

The constitutional necessity of Presidential removal power over executive officers — and in particular of prosecutors — was underscored some forty years later by then-Attorney General Taney, in *The Jewels of the Princess of Orange, supra*. In that opinion, Taney explored the possibility that a district attorney might disobey the President, and considered the President's recourse in that event:

> mained in office, would still go on; because the President could give no order to the court or clerk to make any particular entry. He could only act through his subordinate officer, the district attorney, who is responsible to him, and who holds his office at his pleasure. And if that officer still continued a prosecution which the President was satisfied ought to be discontinued, the removal of the disobedient officer, and the substitution of one more worthy in his place, would enable the President, through him, faithfully to execute the law. And it is for this, among other reasons, that the power of removing the district attorney resides in the President.

2 Op. Atty Gen. at 489. In short, as this Court subsequently agreed, an unfettered removal power is the essential trump card that enables the President to maintain his sway over those executing the laws.[14] *See Myers v. United States*, 272 U.S. at 122.[15]

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[14]Contrary to the suggestion of the Special Division in *In re Olson*, 818 F.2d at 44-45, the essential power is not that of removal for "impropriety," but of removal for *disobedience*.

[15]While *Myers* suggested that the President's removal power over inferior officers might be qualified in cases in which Congress chose to authorize their appointment by the heads of departments, this feature of *Myers* is irrelevant to this case for three reasons. First, as shown above, an independent counsel is not an inferior officer. Second, *Myers* nowhere mentioned the possibility that Presidential removal power could be limited as to an executive officer appointed by a *court*. *See* L. Tribe, *American Constitutional Law* § 4-9, at 189-90 n.23 (1978). Because the discharge of executive functions by one so appointed is itself in derogation of Presidential authority, Presidential removal power is all the more essential to ensure some accountability to the Executive Branch. Third, and most important, the reasons for requiring unrestricted Presidential removal power over the independent counsel apply equally regardless of whether the independent counsel is an inferior or superior officer. In both cases the power is necessary to vindicate the President's authority to take care that laws be faithfully executed. *See* Currie, *The Distribution of Powers after Bowsher*, 1986 Sup. Ct. Rev. at 34-35; Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. at 44.

This conclusion is not, as appellant contends, undermined by this Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974). Rather, that case explicity reaffirmed that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case," *id.* at 693, and held only that where the President or his alter ego, the Attorney General, has chosen to promulgate a regulation creating an independent special prosecutor's office and insulating the special prosecutor from removal, a court must give effect to the Executive Branch's own regulation so long as it is in force. *Id.*at 696. The Court's recognition of the Executive Branch's own power of self-denial — which the executive was free to disavow at any time by revoking the regulation providing for the special prosecutor's authority, *see id.; cf. In re Sealed Case*, 829 F.2d at 56 n.33 — by no means suggests that similar restraints may be foisted on the President through legislation that the Executive Branch is not free to abrogate unilaterally.

B. *The Statute Vests the Judicial Branch with Unprecedented Powers of Removal Over an Executive Officer*

The removal provisions of the Act are further flawed by the authority they give to the appointing court to terminate an office of independent counsel, and thus in effect remove the independent counsel, whenever it determines that further proceedings by the independent counsel are no longer "appropriate." 28 U.S.C. § 596 (b)(2). As the three-judge court observed in its opinion in *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986) (three-judge court), "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." Accordingly, legislation placing removal power over executive officials outside the Executive Branch "creates the here-and-now subservience to another branch that raises separation-of-powers problems." Id. at 1392 (footnote omitted). This Court's affirmance in *Bowsher v. Synar* rested precisely on the ground that the "separation-of-powers problems" created by such subservience are insuperable: the usurpation of executive power inherent in any legislation purporting to grant to another branch such potentially coercive power over officers performing executive functions renders the legislation unconstitutional. 106 S. Ct. at 3188-89.

Bowsher, of course, concerned congressional rather than judicial removal power. See id. at 3188. The reasoning of *Bowsher*, however, goes further. The Court's conclusion that the power to remove an officer is by its very nature the power to coerce and control him does not depend upon whether the power is vested in legislative or judicial hands. Just as it is true that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws," *id.* at 3187, so too is it true that the Judicial Branch has no general supervisory power over the conduct of executive officials. If, as *Bowsher* held, it follows from Congress' lack of power to execute the laws that Congress may not exercise removal authority (and hence coercive power) over executive officers, the same must also be true of the Judicial Branch.[16] The fundamental underpinning of *Bowsher* is the "'necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others.'" 106 S. Ct. at 3188 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)). That essential independence of the branches is as compromised by a judicial, as by a congressional, role in the removal of executive officers.

Nor can it be suggested that the Special Division's power to terminate an office of independent counsel poses no realistic threat of inducing subservience to the court because it was intended for use only in limited circumstances and as a last resort, and has never to date been invoked. Precisely the same argument was made by

[16]Indeed, it would seem that a judicial role in removal of executive officers is even more inimical to the separation of powers than the congressional removal power held unconstitutional in *Bowsher*, for the Constitution itself provides for some congressional role in removal through the impeachment process, *see* 106 S. Ct. at 3190; *id.* at 3212 (White, J., dissenting), but nowhere provides for judicial removal power in any form.

the dissent in *Bowsher*, see 106 S. Ct. at 3211-3213 (White, J. dissenting), and was brushed aside by the majority, *see id.* at 3190-3191. The teaching of *Bowsher* on this point is crystal clear: it is the *potential* for removal, not the likelihood thereof, that, "[i]n constitutional terms," dictates subservience to the branch with removal power. *Id.* at 3191. Performance of executive functions by any officer subservient to another branch is *per se* impermissible even absent proof that such subservience has tangibly affected the performance of his duties. *Id.*[17]

CONCLUSION

The Act's provisions concerning the appointment, removal, and supervision of independent counsel reflect the single animating purpose of removing, insofar as possible, the investigation and prosecution of individuals covered by the Act from Executive Branch control. Even if the individual features of the legislation implementing this scheme could withstand constitutional scrutiny viewed in

[17]The Attorney General's limited removal power, *see* 28 U.S.C. § 596(a), fails to counteract the separation-of-powers problems flowing from the court's independent power to terminate an office of independent counsel. Indeed, the limitations on the Attorney General's removal power are so extensive that they actually tend to reinforce an independent counsel's ultimate dependency upon, and hence subservience to, the Court. Not only is the Attorney General's removal authority limited to misconduct or incapacity, but any attempt to exercise that authority also is subject to *de novo* review by the Special Division of the Court of Appeals, which has authority to reinstate its appointee if it disagrees with the Attorney General's decision on either legal or factual grounds. Although recent amendments to the Act have transferred this review function to the district court, those amendments do not alter what the terms of the Act were during the *Deaver* case. An Independent Counsel's ability to appeal *de novo* to the court — the same authority that originally considered him worthy of appointment — ensures that he will in fact be answerable to no one but the court. The court's removal authority thus guarantees that an independent counsel — an officer performing core executive functions — will be beholden to the court; and *Bowsher* firmly holds that such subservience to another branch by an officer exercising core executive power is constitutionally impermissible.

isolation, their combined effect of stripping the executive of central powers and placing them in the hands of officers beyond Presidential control distorts the scheme of separation of powers too much to be condoned. Flexible though the system of separation of powers may be, it is not infinitely malleable, and "a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency." *Williams v. United States*, 289 U.S. 553, 580 (1933) (emphasis in original).

The Act's legislative history confirms that it was explicitly intended to take inherently executive power out of the hands of the Executive Branch and place it elsewhere. Congress elected to intrude upon the executive domain purportedly because of a perception based upon Watergate that this alteration in our system of government was necessary to prevent conflicts of interest *within* the Executive Branch. This asserted justification is simply insufficient to support the constitutionality of the statute. The appeal to necessity or utility not only overlooks historical evidence demonstrating that special prosecutors within the Executive Branch have been equal to the task of prosecuting crimes at the highest levels of government, but it also, and more fundamentally, ignores this Court's admonition that "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised." *INS v. Chadha*, 462 U.S. at 945. In the final analysis, it also ignores that application of the Act in individual cases threatens the fundamental liberties and individual rights of those citizens targeted by an independent counsel investigation or prosecution. While it is perhaps understandable that in responding to Watergate, Congress overlooked the impact the Act would have on individual citizens, this Court now has before it the proof of such impact in both the Olson investigation, and in the *Deaver* case. Both cases demonstrate the danger to individual citizens of the unaccountable exercise of governmental power outside the structural protections of the constitutional principle of separation of powers.

In our system of government, the solution to fears of conflict of interest or abuse of power is not to reassign powers definitively assigned by the Constitution to a particular branch of government, for "such fears, however rational, do not by themselves warrant a distortion of the Framers' work." *Buckley v. Valeo*, 424 U.S. at 134; *see also United States v. Will*, 449 U.S. 200, 213-216 & n.19 (1981); *Bowsher v. Synar*, 106 S. Ct. at 3193-94. Mistrust of the President or the Presidency cannot, under our Constitution, justify taking from the Chief Executive his power to "take Care that the Laws be faithfully executed."

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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